S. HRG. 101-718

CONVENTION AGAINST TORTURE

HEARING

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

JANUARY 30, 1990

Printed for the use of the Committee on Foreign Relations

U.S. GOVERNMENT PRINTING OFFICE

28-065 ⇆ WASHINGTON : 1990

For sale by the Superintendent of Documents, Congressional Sales Office
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S381-15

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CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT, TREATY DOC. 100–20

TUESDAY, JANUARY 30, 1990

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The committee met, pursuant to notice, at 10:05 a.m. in room SD–419, Hon. Claiborne Pell, (chairman of the committee) presiding.

Present: Senators Pell, Helms, Pressler and Murkowski.

The CHAIRMAN. The committee will come to order. This morning's hearing will focus on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

After some 7 years of intense negotiation in which the United States played an active role, the convention was unanimously adopted by the U.N. General Assembly on December 10, 1984, the 36th Anniversary of the Universal Declaration of Human Rights. It has now been ratified by 50 States and signed by 22 others.

The convention represents a major step forward in the international community's campaign to combat torture, because it makes torture a criminally punishable offense. Each party to the convention is obligated to prosecute torturers found in its territory or to extradite them for prosecution elsewhere.

The Reagan administration submitted the convention in May 1988 with 19 proposed U.S. conditions, many of which were of concern to the human rights community, the American Bar Association and others. I appreciate very much the efforts of this administration to address these concerns and reduce the proposed list of conditions.

In 1984 Congress enacted a joint resolution, which I sponsored along with Senator Percy, reaffirming the U.S. Government's opposition to torture. By ratifying this convention we can demonstrate that the United States is determined to take concrete steps to eradicate this evil, horrible and inhumane practice.

I will now turn to the ranking minority member, Senator Helms.

Senator HELMS. Mr. Chairman, thank you very much. I guess the record ought to show at the outset that nobody is in favor of torture. Not anybody on this committee, not anybody in Congress, not anybody in Government. Nobody favors torture under any circumstances. I just want to get that on the record before we begin.

The 8th Amendment to our Constitution prohibits cruel and inhuman punishment. That has been extended by the Supreme Court in this century, utilizing the due process clause to protect individ-

uals under arrest and those merely being questioned by law enforcement officers.

So, this country just does not torture anyone, by law or in fact, and if anything our Supreme Court jurisprudence overly protects some criminal suspects and criminal defendants, and even, by way of appeal, convicted criminals.

So, I must be frank. This Torture Convention reminds me of another convention which required 35 years before the Senate got around to approving it and 37 years before that convention entered into force. To paraphrase our former President, Ronald Reagan, here we go again.

I am referring, of course, to the Genocide Treaty—the genocide convention, to use its proper name. Now, the Torture Convention appears to be a direct analog with the genocide convention. The genocide convention was not approved by the Senate until—until—a package of reservations, understandings and declarations were approved by the Senate in its resolution of ratification. I had a little something to do with that. Sam Irvin started the job, I will say to my friend Judge Sofaer.

Now, that package, voted upon in its entirety, protected the Constitution, which is my interest, and also preserved constitutional protections. If this convention is to be approved, I think it is our constitutional obligation to do the same with this one as we did with the genocide convention.

Now, I will pursue my specific concerns when I begin to question the witnesses appearing before us this morning. However, let me call your attention, Larry, to a right interesting bit of information.

Look down the list of countries which have ratified the Torture Convention. For example, the Soviet Union, Communist China—you know, that nice little crowd over at Beijing that made paste out of that fellow standing up before the tanks they signed it.

Afghanistan, Bulgaria, and East Germany, which still has secret police, Hungary, which still has secret police, Czechoslovakia at the time of its dictatorship, and Mr. Gorbachev, the great PR man, has not closed up his so-called mental hospitals and he has not released the political prisoners being brainwashed there. As for Communist China, I guess running over innocent civilians with tanks is not torture under this convention.

Now, I raise these questions about the administration because people identified and associated with the administration have decreased—decreased—the number of reservations and understandings offered by the previous administration. In fact, I do not understand the entire approach to Communist China, I confess that, and China's massive violations of human rights. I am also concerned that this Torture Convention is a dagger pointed at the heart of Israel by the Arab States and the PLO and, of course, the PLO does not believe in torture.

In conclusion, Mr. Chairman, I think we had better take a very hard look at this convention. More than 100 governments have neither signed nor ratified this document, and those who have include some of the worst violators of human rights, not only in this century but in the history of mankind.

Now, in North Carolina, when you catch a skunk in a bag you had better know what you have done. I feel we had better be very

careful about how we approach this convention and I intend to do so, and it might take a little time.

So I thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much indeed. We now will hear from Judge Sofaer, but first, Senator Pressler.

Senator PRESSLER. Thank you, Mr. Chairman.

Like my distinguished colleague from North Carolina, I am also concerned about the Torture Convention. From a legal perspective, the Torture Convention contains much loose and imprecise language which raises many ambiguities.

I do not support the roundabout compulsory jurisdiction mechanism which can subject the ratifying states party to the International Court of Justice.

I do not know what the terms, "cruel, inhuman and degrading" mean outside the U.S. Constitution. Despite the proposed reservation for article 16, that reservation does not speak to anything outside of punishment—for example, arrest, confinement and interrogation.

I do not like the role of the committee found in articles 17 through 24. I do not like the deletion of common law defenses which were proposed by the Reagan administration. Frankly, the reason for their omission in the Bush provisos is unclear, and perhaps we will hear more about that.

I strongly believe that there must be implementing legislation, as with the genocide convention, before the President can implement ratification of this document.

What happened to the requirement in American law laid down by the U.S. Supreme Court 178 years ago in the *U.S.* v. *Smith* decision by Justice Story that no one can be subjected to trial and punishment under American law without a statute first having defined the crime and then provided for a specific punishment? I do not support treaties which change American domestic law and legal procedures.

Some of the questions I have I hope Judge Sofaer, whom I welcome here, and others, will address. I am puzzled by the obvious contradiction in the administration's approach to asylum and deportation.

The standard for asylum, as you present it, is that the person or persons seeking asylum could more likely than not face persecution if they sent back to where they came from, but the standard imposed by the Supreme Court to prevent deportation is a well-founded fear of persecution in the *Cardoza-Fonseca* case. This is a higher standard.

Now also, I am puzzled by the absence of the human rights assistant secretary and international organizations assistant secretary. Are there differences in various U.N. conventions that make some merely legal and some merely political?

What are the specific reasons for the reductions of the Reagan package of reservations, understandings and declarations by the Bush administration? There seem to be a difference here.

As I am sure you are all well aware, I voted to override the President's veto on the issue of statutory temporary asylum for Chinese students. Is the PRC a violator of human rights, and if so,

why has the PRC not been condemned for these violations by the United Nations?

So those are some of the things I hope are addressed in the comments of the witnesses that will perhaps help clarify this whole matter.

The CHAIRMAN. Thank you. Judge Sofaer and Mr. Richard, would you please come forward? Your statements will be printed in full in the record. If they can be abbreviated, it would be appreciated.

STATEMENT OF HON. ABRAHAM D. SOFAER, LEGAL ADVISER, DEPARTMENT OF STATE

Mr. SOFAER. Certainly, Mr. Chairman, and thank you very much. It is an honor to be here this morning. I will summarize my statement and appreciate that the full statement will appear in the record.

The CHAIRMAN. Without objection.

Mr. SOFAER. I am honored to appear before the committee this morning to urge the prompt and favorable action of the committee on the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

We are prepared to address the questions that were raised earlier, as well as any other questions that Senators may have. We believe that the reservations, understandings and declarations that are now proposed which now include the capital punishment understanding that we have just recently sent to the committee, Mr. Chairman, are satisfactory and protect U.S. interests, but if there are other reservations or understandings that the committee wishes to propose in order for us to adopt this convention in a collegial spirit, certainly the administration would be willing to entertain those suggestions.

The Bush administration places a high priority on early ratification. The need for this convention, Mr. Chairman, stems from the tragic fact that torture continues to be practiced on a daily basis in many nations throughout the world, systematically and with the support or acquiescence of government officials.

As President Reagan said in his letter of transmittal, this convention marks a significant step in the continued development of appropriate international measures to eliminate such barbaric practices. The fact that some of the biggest offenders have already signed and ratified the convention is not one that we should be unhappy about, Mr. Chairman. It is one that we should be pleased about, because while their motivation might be to pretend that they are abiding by this convention, they will open themselves up to the remedies of this convention and have opened themselves up to the remedies of this convention by signing and ratifying it.

International law already condemns torture, and I refer in my prepared statement to the many conventions and declarations in which torture is condemned under international law. This convention builds on those declarations and other agreements.

The essential purpose of this convention is to codify international law regarding the crime of torture, and to require states party to deter and punish acts of torture pursuant to their domestic laws.

The basic obligations are to take administrative, judicial or other measures to prevent torture within the territory of each party, to make clear that torture cannot be justified, to make all acts of torture criminal offenses and establish jurisdiction over them, and to decline to expel, return or extradite a person to another state where there are "substantial grounds for believing that he would be in danger of being subjected to torture."

This convention mirrors the approach adopted by the international community in the area of terrorism. Really, if I may suggest, Senator Helms, it is more similar to the terrorism conventions than it is to the genocide convention in more ways than this—in many, many ways.

What it does is, it tells each state either prosecute torturers or extradite them other than to a state, obviously, which would torture the extradited party. We believe in this approach of prosecute or extradite. We think that the international terrorism conventions are beginning to work, and we think that this approach is the right approach for international law enforcement types of agreements.

We do agree that there is no need for the legal protections of the convention against torture in the United States. Existing U.S. law makes any act falling within the convention's definition of torture a criminal offense as well as a violation of various civil statutes.

We do not have a torture problem within the United States. Nonetheless, we believe, as a member of the international community, that we must stand with other nations in pledging to bring to justice those who engage in torture, whether within the U.S. territory, or in the territory of other countries, and that is why we support this convention.

We have, as you have mentioned, Mr. Chairman, modified the package of reservations, understandings and declarations. We wish to thank, Mr. Chairman, your staff, the staff of this committee, and the many people in private organizations who worked with us in developing this modified package. We think they showed an appropriate regard for our legitimate interests, and at the same time they pressed their own case well, and effectively. It was the kind of interaction between staff and the executive branch staff that is truly beneficial to the legislative process.

We do think, however, that some reservations and understandings are essential, and those are the ones that are in the package, plus the one on capital punishment. This is going to be a criminal penalty.

The torture convention requires us to impose criminal penalties, and it is very important that we be clear about what is going to be punished. We also have a variety of provisions that relate to the nature of our federalism and other peculiarly American issues.

I say that with respect to article 16, there have been concerns about our reservation there. We think it is a good reservation, Mr. Chairman. We must distinguish between torture and cruel, unusual and inhumane treatment prohibitions. The latter is not at the center of this treaty. It is important. Obviously, we agree with it. But the heart of this treaty is the prohibition against torture. We do not want to see a bunch of different rules and standards developed with respect to cruel, unusual and inhumane treatment, and therefore, we have proposed that within the United States the

meaning of "cruel and inhumane treatment" will be the same as the meaning of our Constitution's cruel and unusual penalties clause.

We would be prepared, of course, to answer any of your questions about the package, Mr. Chairman.

We have agreed to a limited role for the committee against torture. We think it is proper for us to respond to the claims of other states that are members, that are signatories and parties, and where the committee believes we should respond.

We do not believe we should respond to every individual claim of torture before the committee. Of course, we would publicly respond, but we do not believe that we should put the United States through the expense of responding to every single complaint that anyone could conceivably raise.

Having served 6 years in the district court, Mr. Chairman, I can tell you that any claim you could possibly imagine that a human being could raise would understate the types of claims that people find in the capacity and the imagination to raise in our own Federal courts, let alone in an international committee against torture.

With respect to the ICJ, Mr. Chairman, you know that we have underway a major initiative with the other members of the permanent five to the security council to develop a method for utilizing the ICJ that would be protective of the legitimate interests of all parties before the court. We feel that we should not subject the United States to litigation before the ICJ under this convention until those protections are put into place.

When we have that convention negotiated and approved by the Senate, we would then come back to the Senate at that time and ask for the application of that set of procedures and protections to every convention in which we subject ourselves to the court's review.

The lawful sanctions issue, Mr. Chairman, deserves just a word. We do reserve the right to impose what are referred to as lawful sanctions. We think it is appropriate to recognize that some countries might treat as lawful or claim as lawful sanctions that are in fact violative of the convention, and in that situation we propose that those sanctions would not be considered lawful sanctions.

We feel the death penalty provision is necessary in light of the Soering decision, which I could discuss with the committee if it sees fit to talk about that.

We do believe, Mr. Chairman, that implementing legislation should be adopted before the convention is deemed to be effective.

In conclusion, Mr. Chairman, the administration strongly supports the early ratification of this important human rights treaty. Prompt ratification will make clear our collective abhorrence and condemnation of torture.

In reviewing and modifying the package of proposed reservations, declarations and understandings, we have worked hard both within the executive branch and with the human rights community to take into account the various express concerns and interests. We believe this is a good treaty with the reservations, understandings and declarations, and one which will serve our international interest as well as those of the international community.

I will be pleased to answer any questions you may have.

[The prepared statement of Mr. Sofaer follows:]

PREPARED STATEMENT OF ABRAHAM D. SOFAER

Mr. Chairman: I am honored to appear before the Committee this morning to urge prompt and favorable action on the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The Bush administration places a high priority on the early ratification of this important human rights treaty, for substantive as bell as symbolic reasons. The need for this Convention, Mr. Chairman, stems from the tragic fact that torture continues to be practiced on a daily basis in many nations throughout the world, systematically and with the support or acquiescence of government officials. As President Reagan said in his letter of transmittal to the Senate, this Convention marks a significant step in the continued development of appropriate international measures to eliminate such barbaric practices. Early ratification of the Convention by the United States bill clearly affirm our known abhorrence and condemnation of torture.

International law already condemns torture. In that sense, the Convention breaks little new ground.

For example, prohibitions against torture and other forms of ill treatment are contained in one form or another in the 1948 Universal Declaration of Human Rights (Article 5), the American Declaration of the Rights and Duties of Man (Articles 15 and 16), and the 1975 United Nations Declaration on the Protection of All Persons from Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. Moreover, the Geneva Conventions of 1949 make torture in wartime a grave breach of the Conventions and require its Parties to prosecute or extradite individuals responsible for torture. These declarations and conventions have been widely supported in the international community; for example, the Geneva Convention for the Amelioration of the condition of the wounded and sick on armed forces in the field of 1949 has been ratified by 167 states.

The Convention Against Torture builds upon these international human rights instruments by adding an agreed international peacetime regime for cooperation among States in the prevention of torture and the punishment of those who engage in acts of torture.

The United States contributed significantly to the development of the Convention. We did so with broad bipartisan support.

In 1984, Congress passed and the President signed a Joint Resolution (Pub. L. 98-447, Oct. 4, 1984) reaffirming the continuing policy of the United States to oppose acts of torture whenever they occur and requesting the President to continue U.S. involvement in the formulation of this Convention.

The text of the Convention was elaborated within the context of the United Nations Commission on Human Rights and was adopted by unanimous consent in the U.N. General Assembly on December 10, 1984. It entered into force on June 16, 1987 and now has 48 Parties. The United States signed the Convention on April 18, 1988, and it was submitted to the Senate for advice and consent to ratification later that year.

I. THE CONVENTION'S REQUIREMENTS

The essential purpose of the Convention is to codify international law regarding the crime of torture and to require States Party to deter and punish acts of torture pursuant to their domestic laws. The basic obligations of a State Party are:

—To take administrative, judicial or other measures to prevent torture within their territory pursuant to Article 2, and to undertake to prevent cruel, inhuman or degrading treatment or punishment not amounting to torture pursuant to Article 16;

—To make clear that torture cannot be justified and that no order from a superior officer or public authority may be invoked as a justification of torture;

—To make all acts of torture criminal offenses, to establish jurisdiction over those offenses when they are committed within the territory of any State Party (or on board its ships or aircraft), by its nationals or (if considered appropriate) against its nationals; and

-To decline to expel, return or extradite a person to another State when there are "substantial grounds for believing that he would be in danger of being subjected to torture." By requiring all States Party to ensure that those responsible for torture will be brought to justice, the Convention will operate to deny safe haven to any who engage in such heinous offenses.

You will recognize, Mr. Chairman, that the Convention has adopted a scheme that mirrors the approach adopted by the international community in the area of terrorism. The basic structure of this Convention parallels that of the 1970 Hague "Hijacking" Convention, the 1971 Montreal "Sabotage" Convention, the 1973 Internationally Protected Persons Convention, and the 1979 Hostage Taking Convention. The United States has long been a party to each of these multilateral treaties, and the Senate recently gave its advice and consent to ratification of yet another treaty which follows the same general structure and legal approach—the IMO Maritime Terrorism Convention. In all these treaties, by common agreement, States Party undertake to criminalize specified conduct under their domestic laws and to establish so-called "universal jurisdiction" to prosecute offenders found within their territories, or to extradite them to other countries for prosecution. (A similar but more limited approach is followed in the genocide convention, to which the Senate gave its advice and consent to ratification, on February 19, 1986.)

Mr. Chairman, some may feel the United States has no need for the legal protections of the Convention Against Torture. Existing U.S. law makes any acts falling within the Convention's definition of torture a criminal offense, as well as a violation of various civil statutes. Potential remedies include incarceration, compensation, and the full range of equitable relief. Any Public official in the United States, at any level of government, who inflicts torture (or instigates, consents to, acquiesces in, or tolerates torture) would be subject to an effective system of control and punishment in the U.S. legal system.

This administration nonetheless believes, Mr. Chairman, that, as a member of the international community, we must stand with other nations in pledging to bring to justice those who engaged in torture, whether in U.S. territory or in the territory of other countries. If we fail to become a party, we will lose credibility as well as the ability to influence the direction of developments in this important area. The United States opposes the use of torture, just as we oppose terrorism, genocide, or illicit drug trafficking, each of which is covered by multilateral conventions to which this nation has recently become a party.

We therefore strongly believe it is appropriate and in our interests to ratify this convention. *The "Package" of Reservations, Declarations and Understandings:*

Mr. Chairman, while we support ratification of the Convention, we believe the U.S. should approve it only after certain protective measures. The Convention's wording, for example, is not in all respects as precise as we believe necessary. The Convention was negotiated on a multilateral basis, within the United Nations, and differing points of view and differing legal systems are necessarily reflected in the final text.

If the Convention were simply a political statement, imprecision would cause no difficulties. However, because the Convention is a legal instrument and creates legal obligations, and especially because it requires establishment of criminal penalties under our domestic law, we must pay particular attention to the meaning and interpretation of its provisions, especially concerning the standards by which the Convention will be applied as a matter of U.S. law.

The administration in fact believes that a number of reservations, declarations and understandings to the Convention are necessary to ensure that we know precisely the scope of the domestic and international legal obligations the United States will assume when the Convention is ratified.

As you know, Mr. Chairman, a fairly extensive "package" of proposed reservations, declarations and understandings was prepared by the previous administration and included in the report of the Secretary of State that accompanied the President's original transmittal of the Convention to the Senate in May 1988. The details of those proposals, and the reasons behind them where described in the memorandum attached to the President's transmittal message (Treaty Doc. 100–20). The package was criticized by some human rights groups, some members of the bar, and other interested parties as unnecessarily broad. These groups were concerned that, even if the proposed reservations would have no affect on the United States implementation of the Convention, the reservations could be seized upon by other states which would seek to invoke them to justify acts of torture.

At your suggestion, Mr. Chairman, we undertook last fall to review the original "package" in light of these criticisms to see whether all of the proposals were in fact necessary and whether some simplification and improvement could be made. In conducting this review, we (and by "we" I mean both the State Department and the Department of Justice) met and consulted not only with Senate staff but also with representatives of concerned organizations—such as Amnesty International and the American Bar Association, among others. This was a mutually beneficial process. It enabled us to explain the concerns of the Executive Branch which lay behind the

initial package, and at the same time to understand why some elements of that package posed some concerns to the international human rights community.

As a result of this review, we revised and simplified the "package" of reservations, declarations and understandings, and transmitted the revised package to you by letter earlier this month. We have briefed committee staff, as well as representatives of concerned human rights groups, on the changes, which we are advised addressed most of the principal concerns they had about the original package.

I will not take the committee's time to review in detail each element of the revised "package," or the changes from the original "package," or the reasons for those changes. Our position on these issues is explained in the memorandum enclosed with the recent

transmittal letter to you. I will touch, however, upon the most important points in the revised package.

COMMITTEE AGAINST TORTURE

One of the most significant changes from the original package, Mr. Chairman, is that the administration now proposes to accept the competence of the Committee Against Torture to receive and consider complaints of torture in the United States from other States Party on a reciprocal basis.

As is common in international instruments concerning human rights, the Convention establishes its own independent oversight body to review the operation and implementation of the Convention by member States. This body—the Committee Against Torture—consists of what the Convention describes as "ten experts of high moral standing and recognized competence in the field of human rights." The committee's membership is elected for 4 year terms by secret ballot from a list of persons nominated by States Party to the Convention. Its members are required to serve in their personal, not official, capacities.

Articles 37 through 24 of the Convention define the committee's organization, competence and responsibilities. In brief, the committee is empowered (1) under Article 19, to review and comment upon reports by States Parties concerning measures they have taken to implement the Convention, and (2) under Article 20 to conduct investigations when it receives "reliable information" appearing to contain "well-founded information that torture is being systematically practiced." States Party may, under Article 28, reject the basic competence of the committee to conduct such investigations. Under Article 21, they may also affirmatively accept the committee's competence to receive and consider claims from another State Party that they are not fulfilling their obligations under the Convention, and under Article 22, they may affirmatively accept the committee's competence to receive and consider communications from or on behalf of individuals subject to their jurisdiction claiming to be victims of violations of the Convention.

The original package proposed that the United States decline to accept the committee's competence in order to provide the Government an opportunity to evaluate the committee's performance on the basis of a sufficient body of work.

We have decided, however, to drop the proposed reservation under Article 28 and thus to accept the committee's basic competence to investigate allegations of noncompliance by the United States. In addition, we propose to accept affirmatively the committee's competence to receive and consider, on a reciprocal basis, communications from other States alleging that the U.S. is violating the Convention. We believe that by participating in the work of the committee the United States will have a positive influence on its work and enhance our ability to focus the attention of the committee on the practices of other States which we may conclude engage in torture.

We continue to believe that the U.S. should not accept the committee's competence to adjudicate complaints from individuals against the U.S. We believe that such complaints are likely to be frivolous, and aimed at embarrassing the United States rather than at rectifying the form of injustice with which the Convention was intended to deal. Any legitimate complaints of torture by officials in the U.S. would be remediable in our Federal and State courts. Defending such claims in an international tribunal would waste limited resources and entail unwarranted risks.

DEFINITION OF TORTURE

A second important revision we propose concerns the definition of "torture" under Article I. The original package proposed an understanding to the effect that, in order to constitute "torture," "an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering." This proposal was criticized by

some as possibly setting a higher, more difficult evidentiary standard than the Convention required. Substantial concern was expressed that the effect of this understanding might be to undercut the central feature of the Convention, at least as codified in U.S. law, and to encourage other States also to adopt higher domestic standards, thereby limiting the effectiveness of the Convention.

Although no higher standard was intended, we recognized the concern raised by this criticism. At the same time, our colleagues at the Justice Department felt that, since the definition of "torture" will constitute the basis for a criminal punishment under U.S. law, some clarification of the Convention's definition was constitutionally required.

Accordingly, and on the basis of extensive discussions with concerned representatives in the human rights community, we prepared a codified proposal which does not raise the high threshold of pain already required under international law, but clarifies the definition of mental pain and suffering, and maintains the position that specific intent is required for torture.

The revised understanding reads as follows: "The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality."

While somewhat more lengthy than the earlier proposals we believe this revised understanding accommodates the concerns of those responsible for seeing that prospective defendants are treated fairly under our domestic law, on the one hand, and those on the other hand who are concerned not to undermine the effective implementation of the Convention by other States around the globe.

LAWFUL SANCTIONS

Another point of criticism of the original package has been its proposed understanding concerning the scope of "lawful sanctions," as used in Article 1.

You will recall, Mr. Chairman, that Article 1 excludes from the definition of torture "pain or suffering arising only from, inherent in or incidental to lawful sanctions." The initial understanding indicated that the term "sanctions" would include "not only judicially-imposed sanctions but also other enforcement actions authorized by United States law or by judicial interpretation of such law." This clarification was thought necessary because the Convention does not itself indicate whether the "lawfulness" of sanctions (judicially imposed penalties as well as enforcement actions) should be determined by domestic or international law. Our earlier proposal, Mr. Chairman, was intended to protect against illegitimate claims based on unclear standards that law enforcement actions authorized by U.S. law constitute torture within the meaning of the Convention.

Critics of this proposal pointed out, however, that such a formula would open the possibility for any State Party to the Convention to attempt to legitimize officially-sanctioned torture simply by authorizing it specifically as a matter of domestic law.

A State could then use the same rationale to exempt its torturers from prosecution under the Convention. This possibility obviously, was not what we had intended. Upon further reflection, therefore, we have clarified our position to make clear that domestic legality does not remove an action from the Convention's definition of torture if the action violates a clear prohibition in international law. In other words, we propose that States Party not be permitted to invoke the "lawful sanctions" exception to legitimize activities which clearly amount to "torture" in contravention of the basic object and purpose of the Convention, even if they are technically lawful under their own domestic law.

Questions have been raised about whether this Convention affects our application of the death penalty.

Mr. Chairman, I want to emphasize my firm and considered opinion that the death penalty does not violate international law, nor does international law require the abolition of the death penalty. Many, perhaps even most, countries in the world today provide for capital punishment for some offenses under their domestic laws, and none of the major international human rights instruments prohibit the death

penalty. The European Court on Human Rights recently held explicitly that the death penalty was not unlawful under international law.

Moreover, international law could not develop a prohibition against capital punishment applicable to the United States, as long as the United States continues to impose the death penalty and to object to development of such a norm.

Nonetheless, some concerns have been expressed that the United States should take no risks in this regard. To allay these concerns, the administration has decided to propose an additional understanding, addressed explicitly to the death penalty issue. Since the death penalty is clearly not a violation of international law, this in no way derogates from the Convention. Specifically, we propose that the following understanding be reflected in the Senate's resolution of advice and consent as well as in our instrument of ratification: "The United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty."

I regret that this additional understanding was not included in the revised package of reservations, understandings, and declarations transmitted to the committee, but, in preparing for this hearing, we concluded that it was appropriate and prudent to be categoric with our treaty partners with respect to our position on the death penalty.

OTHER CHANGES

Among the other changes to the original package, Mr Chairman, we have deleted the former understanding on common law defenses, which was widely misunderstood, and we have deleted our former reservation to the obligation not to extradite individuals if we believe they would be tortured upon their return to the requesting State. The United States supports the obligation of "non-refoulement," and we never intended to suggest by the proposed reservation that we wished to retain the right to send a person back to a country where that person would be tortured.

CRUEL, INHUMAN OR DEGRADING PUNISHMENT

The Convention deals primarily with "torture." In Article 16, however, the Parties also undertake to prohibit lesser forms of ill-treatment under the rubric of "cruel, inhuman or degrading treatment or punishment." The revised package retains a statement to the effect that the United States considers itself bound, under Article 16, to prevent "cruel, inhuman or degrading treatment or punishment" not amounting to torture only insofar as those words mean the cruel and unusual punishment prohibited by the Fifth, eighth and/or Fourteenth Amendments to the Constitution. In fact, the revised package upgrades this point to a reservation from the status of an understanding.

The reason for this reservation is straightforward. The formulation used by Article 16 is ambiguous, particularly in its reference to "degrading treatment." Of course, our own 8th Amendment to the Constitution protects against cruel and unusual punishment. Our courts have interpreted this prohibition to protect against a broad range of practices that involve the unnecessary and wanton infliction of pain. This provision, which applies to convicted persons, covers their living conditions, disciplinary treatment, and medical care. These protections have been applied not only in prison contexts but also, under the Fifth Amendment incorporates these protections and makes them applicable to the States.

We would, expect, therefore, that our Constitution would prohibit most (if not all) of the practices covered in Article 16's reference to cruel, inhuman and degrading treatment or punishment. Nevertheless, we are aware that some countries give a broader meaning to this provision. for example, the European Court of Human Rights in Strasbourg has found the so-called "death row phenomenon" to constitute "cruel, inhuman and degrading treatment or punishment."

While such decisions are not binding on our courts, it is prudent that the U.S. specify that, because the Constitution of the United States directly addresses this area of the law, and because of the ambiguity of the phrase "degrading," we would limit our obligations under this Convention to the proscriptions already covered in our Constitution.

We also propose a reservation to the effect that the United States does not consider itself bound to submit to the jurisdiction of the International Court of Justice in cases of interpretation or application of the Convention, but reserves the right to agree to do so or to follow any other procedure for arbitration in a particular case.

Such a reservation is consistent with the policy of this administration and its predecessor, concerning the International Court of Justice. It is also consistent with the Senate's decision to require such a provision in the genocide convention. We believe that, in due course, when a fair and reliable regime for using the ICJ is in place, the U.S. will be able to utilize the ICJ on a mandatory basis under this and other treaties.

IMPLEMENTING LEGISLATION

The Convention is not self-executing, Mr. Chairman, and thus will require implementing legislation, as in the case of most multilateral treaties concerning human rights and counter-terrorism. The provisions of Article 3 would be implemented by "competent authorities" within the Department of Justice and State as appropriate. Although we have deleted the proposed declaration on this subject as unnecessary, we intend to deposit the instrument of ratification as soon as the implementing legislation has been enacted. We should make this Convention legally binding only after Congress has provided the means for fulfilling its obligations.

In conclusion, Mr. Chairman, the administration strongly supports the early ratification of this important human rights treaty. Prompt ratification will make clear our collective abhorrence and condemnation of torture. In reviewing and modifying the "package" of proposed reservations, declarations and understandings, we have worked hard both within the Executive Branch and with the human rights community to take into account the various expressed concerns and interests. We believe this is a good treaty, one which will serve our international interests as well as those of the international community.

It has the formal support of the American Bar Association and the human rights community, as you will no doubt hear in testimony later today. We urge that the Senate give its advice and consent to ratification.

I will be pleased to answer any questions you may have.

The CHAIRMAN. Thank you very much.

Mr. Richard.

STATEMENT OF MARK RICHARD, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Mr. RICHARD. Thank you, Mr. Chairman. My name is Mark Richard. I am the Deputy Assistant Attorney General in the Criminal Division, Department of Justice. With your permission, Mr. Chairman, I would propose submitting my written statement for the record and merely summarizing it at this time.

The CHAIRMAN. Thank you.

Mr. RICHARD. It is a pleasure for me to appear before this committee to testify in support of the torture convention and to explain the concerns the Department of Justice has with some of those provisions and how the proposed reservations, understandings and declarations address those concerns.

As I indicated, we fully support the worldwide effort to outlaw torture and to make its perpetrators international criminals subject to prosecution wherever they may be found.

The basic problem with the convention, one that permeates largely all of our concerns at the Department of Justice, is its imprecise definition of torture, especially as that term is applied to actions which result solely in mental anguish. This definitional vagueness makes it doubtful that the United States can, consistent with constitutional due process constraints, fulfill its obligation under the convention to adequately engraft the definition of torture into the domestic criminal law of the United States.

Unless this definitional problem is addressed as it is, we believe, in our reservations, understandings and declarations, the torture

convention, we fear, will have the effect of fostering unwarranted litigation in numerous areas of law enforcement.

The convention does place U.S. law enforcement officials when traveling overseas at risk of arrest and prosecution in foreign jurisdictions or even extradition to a third country for purported violations committed within the United States. This result, I would add parenthetically, remains the same whether in fact we adhere to the convention or not.

The fact remains that the would-be defendant law enforcement official would be subjected to trial under a definition which, viewed in light of U.S. constitutional principles, is so imprecise as to raise the specter of fundamental unfairness.

While we realize that no reservation, understanding or declaration will by itself stop the outlaw nations intending to harm the United States, we should not be insensitive to the potential problems we may encounter in this regard.

Nevertheless, the reservations, understandings and declarations we have proposed, if found to be acceptable in the international community, will favorably affect the evolution of the concept of torture under international law. We believe they are reasonable and necessary to protect the legitimate efforts and interests of law enforcement in this country.

They have been drafted to take into consideration and honor the valid concerns of those private individuals and groups who on a daily basis fight torture around the world. They have been crafted to protect the innocent, not to shield the guilty.

The torture convention defines torture as any act other than one undertaken as part of a lawful sanction "by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as intimidating or coercing him or a third party or for any reason based on discrimination of any kind."

In crafting the definition of the term "torture," the drafters had no significant body of international legal precedent on which to draw. As a result, it is perhaps not surprising that they settled on a relatively general definition. Torture is understood to be that barbaric cruelty which lies at the top of the pyramid of human rights misconduct.

As applied to physical torture, there appears to be some degree of consensus that the concept involves conduct, the mere mention of which sends chills down one's spine. Insofar as physical pain is concerned, the boundaries of torture as defined by the convention appear to have satisfactory clarity.

It is, however, in regard to the area of mental pain that the definition poses the greatest problem. Mental pain is by its nature subjective. There is presently no consensus or well-defined body of international law concerning what degree of mental suffering is required to constitute torture. Accordingly, the torture convention's vague definitions concerning the mental suffering aspect of torture cannot be resolved by reference to established principles of international law.

In an effort to overcome this unacceptable element of vagueness, we have proposed an understanding which defines severe mental pain constituting torture with sufficient specificity, we believe, to

protect innocent persons and meet constitutional due process requirements.

Our proposed understanding encompasses conduct calculated to generate severe and prolonged mental suffering of the type which can properly be viewed as rising to the level of torture. As such, it properly condemns as torture intentional acts such as those designed to damage and destroy the human personality.

The package of reservations, understandings and declarations submitted to the committee earlier this month proposes five understandings concerning the definition of torture. Due to the questions which have arisen concerning the convention's effect on the use of the death penalty, a sixth understanding has in fact been added. The first understanding related to specific intent and severe mental harm I have already discussed. I would like to explain just briefly the reasons for the others.

The first of these provisions expresses the understanding that article 1 applies only to acts directed against persons in the offender's custody or physical control. This is intended to clarify the point that the convention does not apply to situations before custody is obtained.

The next understanding addresses the meaning of the term "sanctions" as used in article 1. It is designed to ensure that law enforcement actions undertaken consistent with statute or case law as opposed to just judicial orders are not interfered with by the convention unless such conduct clearly violates international law. This makes clear, for example, that the use of reasonable force to maintain order in a penal institution is not prohibited by the convention.

The next understanding addresses the term "acquiescence" and clarifies that to be culpable under the convention for activity constituting torture, the public official must have had prior awareness of such activity and must have breached his legal responsibility to intervene to prevent the activity. This understanding, we believe, is necessary to ensure that article 1 complies with the due process requirements of the Constitution. Of course, knowledge under our law includes not only actual knowledge such as when a superior actively directs or participates in the prohibited activity but also willful blindness; that is, the situation where the superior has a duty to prevent the misconduct and deliberately closes his eyes to what would otherwise have been obvious to him.

The next understanding relating to article 1 provides that noncompliance with applicable legal procedural standards does not per se constitute torture. It is intended to demonstrate that court orders suppressing evidence based on misaction by law enforcement agents in the United States do not in and of themselves establish the existence of torture.

In our judgment, the understandings are relevant and beneficial to all parties. Moreover, they can in no way be construed to benefit the public officials who are actually engaged in the practice of torture.

With regard to article 3, extradition and deportation, this article will probably have the most day-to-day impact upon law enforcement activities in the United States. The United States does not

and, we trust, never would extradite or deport a person to a country where it is known that he would be subjected to torture.

Article 3 could, in conjunction with the broad definition of torture, cause major difficulties for the enforcement of our extradition and deportation laws unless the applicable standard is clearly enunciated and the definition is properly understood.

Article 3 places an obligation upon the competent authorities of the United States not to deliver an individual to a country where he would be tortured. Under our existing law, the competent authorities for ensuring the execution of this obligation are the Secretary of State for extradition and the Attorney General for deportation.

Because article 3 does not permit any discretion or provide for any exceptions, it is not completely analogous to current immigration law where withholding of deportation allows exceptions and the granting of asylum provides discretion for those who otherwise meet the threshold requirements.

Because of the lack of discretion and any exceptions, it is important that article 3 be properly understood. Our proposed understanding sets the appropriate standard in our judgment. The standard is comparable to that utilized under deportation, which is "more likely than not."

We have proposed a reservation applicable to article 16. That reservation would define our obligations under that article in terms of the cruel, unusual and inhumane treatment or punishment prohibited by the 5th, 8th and 14th amendments to the Constitution.

This concludes a summary of my prepared remarks, Mr. Chairman. I will be glad to answer any questions you may have at this time.

[The prepared statement of Mr. Richard follows:]

PREPARED STATEMENT OF MARK RICHARD

My name is Mark Richard. I am a Deputy Assistant Attorney General in the Criminal Division. It is a pleasure for me to appear before this committee today to testify in support of the Torture Convention and to explain the concerns the Department of Justice has with some of the provisions and how the proposed reservations, understandings and declarations address those concerns: My testimony will focus upon those articles of the Convention which raise law enforcement concerns, namely Articles 1, 3, and 16.

At the outset, I note with some pride that torture, as understood by most persons, committed by public officials does not often occur within this country and when, if it does, the Department of Justice is committed to seeing that appropriate prosecutions are instituted. As a people we have established constitutional safeguards to protect our inhabitants against wanton and willful violence by public officials. These constitutional protections are revered by our people and are guarded closely not only by our courts, through, for example, prohibiting the use of coerced confessions, but also by law enforcement agencies which conscientiously enforce criminal laws prohibiting assaults upon our person and our civil rights. Federal civil rights laws are especially vigorously enforced. Moreover, tort law in this country provides civil remedies to any person who may be physically abused by a public official. We fully support the worldwide effort to outlaw torture and to make its perpetrators international criminals subject to prosecution wherever they may be found.

Having said such, one might wonder why we found it necessary to propose a number of reservations, understandings, or declarations in regard to a well intended convention against torture. The basic problem with the Torture Convention—one which permeates all our concerns—is its imprecise definition of torture, especially as that term is applied to actions which result solely in mental anguish. This definitional vagueness makes it very doubtful that the United States can, consistent with Constitutional due process constraints, fulfill its obligation under the Convention to

adequately engraft the definition of torture into the domestic criminal law of the United States. Further, unless this definitional problem is addressed, the Torture Convention we fear will have the effect of fostering unwarranted litigation in numerous areas of law enforcement.

The potentially adverse impact of the definitional imprecision of the term torture is compounded when considered in the context of the international jurisdiction created by the Convention. The Convention places U.S. law enforcement officials, when traveling overseas, at risk of arrest and prosecution in foreign jurisdictions, or even extradition to a third country, for purported violations committed within the United States. Even when such a prosecution is well-intended, albeit perhaps misguided, the fact remains that the would be defendant law enforcement official will be subjected to trial under a definition which, viewed in light of U.S. Constitutional principles, is so imprecise as to raise the specter of fundamental unfairness. We believe that, in becoming a party to the Convention, the United States has an obligation to raise and if possible rectify this problem.

A related concern, flowing from the definitional problem, is that the Convention may be used by some unscrupulous foreign governments as a pretext for hostile actions against U.S. officials. Acts which have previously been viewed as hostage-taking may now be cloaked with an appearance of legitimacy under the Convention, thereby muting international condemnation and foreclosing avenues of potential solution. As a nation, our public officials routinely travel throughout the world. Moreover, this country's aggressive law enforcement response to the worldwide problems of terrorism and drug trafficking serves to place more of our public officials at risk. While we realize that no reservation, understanding, or declaration will by itself stop an outlaw nation intending to harm the United States, we should not be insensitive to the potential problems we may encounter.

Hopefully, the reservations, understandings, and declarations we have proposed will find acceptance in the international community and will favorably affect the evolution of the concept of torture under international law. We believe that they are reasonable and absolutely necessary to protect the legitimate efforts and interests of law enforcement in this country. They have been drafted to take into consideration and honor the valid concerns of those private individuals and groups who on a daily basis fight torture around the world. They have been crafted to protect the innocent, not to shield the guilty.

ARTICLE 1—THE DEFINITION

The Torture Convention defines torture as any act, other than one undertaken as part of a lawful sanction, ". . . by which *severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as * * * intimidating or coercing him* or a third party, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" (emphasis added).

While torture has been outlawed for many decades under the international law of war, the Torture Convention is one of the first international legal instruments to define the term. Until the last two decades, human rights practice lumped the concept of torture together with inhuman treatment and degrading treatment, all three of which were equally prohibited. None was defined and no distinction in sanction existed for a violation. For there to be a violation, only one of the three concepts (*i.e.*, torture, inhuman treatment *or* degrading treatment) must have been infringed.

The drafters of the Torture Convention, recognizing that torture is the most serious of the three concepts, decided to separate it from the two lesser forms of human rights misconduct. However, due to the historical treatment of torture as an indivisible part of a larger whole, the drafters of the Convention were forced to embark on a relatively uncharted course. In crafting a definition of the term torture, they had no significant body of international legal precedent on which to draw. As a result, it is perhaps not surprising that they settled on a relatively general definition. Torture is understood to be that barbaric cruelty which lies at the top of the pyramid of human rights misconduct.

As applied to physical torture, there appears to be some degree of consensus that the concept involves conduct the mere mention of which sends chills down one's spine: the needle under the fingernail, the application of electrical shock to the genital area, the piercing of eyeballs, etc. Techniques which inflict such excruciating and agonizing physical pain are recognized as the essence of torture. Hence, the Convention chose the word "severe" to indicate the high level of the pain required to support a finding of torture. Moreover, to constitute torture the action must be

done in a deliberate and calculated manner, or, to put it in customary United States legal terminology, it must be done with specific intent to inflict such a high level of pain. Therefore, insofar as physical pain is concerned, the boundaries of torture as defined by the Convention appear to have satisfactory clarity.

It is, however, in regard to the area of mental pain that the definition poses the greatest problem. Mental pain is by its nature subjective. Action that causes one person severe mental suffering may seem inconsequential to another person. Moreover, mental suffering is often transitory, causing no lasting harm.

One respected human rights treatise suggests that mental suffering sufficient to constitute torture can occur from a person's having been subjected to solitary confinement or insulting language or from having been forced to strip naked. Paul Sieghart, *The International Law of Human Rights*, Clarendon Press, Oxford, at 164. While other treaties and international law scholars argue persuasively that this characterization of torture is an overstatement, it does serve to demonstrate that there is presently no consensus or well defined body of international law concerning what degree of mental suffering is required to constitute torture. Accordingly, the Torture Convention's vague definition concerning the mental suffering aspect of torture cannot be resolved by reference to established principles of international law.

In an effort to overcome this unacceptable element of vagueness in Article 1 of the Convention, we have proposed an understanding which defines severe mental pain constituting torture with sufficient specificity to protect innocent persons and meet Constitutional due process requirements. In formulating this understanding, we have drawn on international case law and treaties as well as on international law scholars. Our proposed understanding encompasses conduct calculated to generate severe and prolonged mental suffering of the type which can properly be viewed as rising to the level of torture. As such, it properly condemns as torture intentional acts such as those designed to damage and destroy the human personality. In contrast, it does not encompass the normal legal compulsions which are properly a part of the criminal justice system interrogation, incarceration, prosecution, compelled testimony against a friend, etc.—notwithstanding the fact that they may have the incidental effect of producing mental strain.

We have proposed five understandings concerning the definition of torture. The first—relating to specific intent and severe mental harm—I have already discussed. I would like to explain briefly the reasons for the other four.

The first of those provisions expresses the understanding that Article 1 applies only to acts directed against persons in the offender's custody or physical control. This is intended to clarify the point that the Convention does not apply to situations before custody is obtained, but rather comes into play when an individual has been subjected to the custody or control of a government official or agent acting on the official's behalf. Hence the rules relating to proportionality in the use of force in effecting an arrest and in self defense are essentially unaffected by the Convention, as those rules normally relate to actions occurring prior to a public official's having effected custody of the subject.

The next understanding addresses the meaning of the term "sanctions" as used in Article 1. It is designed to ensure that law enforcement actions undertaken consistent with statute or case law, as opposed to judicial order, are not interfered with by the Convention unless such conduct clearly violates international law. This makes clear that, for example, the use of reasonable force to maintain order in a penal institution is not prohibited by the Convention.

The next understanding addresses the term "acquiescence" and clarifies that, to be culpable under the Convention for activity constituting torture, the public official must have had prior awareness of such activity and must have breached his legal responsibility to intervene to prevent the activity. This understanding is necessary to ensure that Article 1 complies with the due process requirements of the Constitution. Further, the understanding reflects an intention that the criminal sanctions contained in the Convention for action constituting torture be focused on knowing misconduct as opposed to negligent inaction. Under our system of criminal law, serious misconduct of the type covered by the Convention requires that a defendant have had sufficient "knowledge" to be found guilty. Of course, knowledge under our law includes not only actual knowledge, such as when a superior actively directs or participates in the prohibited activity, but also willful blindness, that is the situation where the superior has a duty to prevent the misconduct and deliberately closes his eyes to what would otherwise have been obvious to him.

The final understanding relating to Article 1 provides that noncompliance with applicable legal procedural standards does not *per se* constitute torture. It is intended to demonstrate that court orders suppressing evidence based on misaction by law enforcement agents do not, in and of themselves, establish the existence of torture.

Most legal systems in the world do not have an exclusionary rule and, therefore, U.S. suppression rulings may be misconstrued by people in other countries. The potential for misunderstanding is particularly great because Article 1 of the Convention establishes an international exclusionary rule for any statement produced by torture. As a result, there may be a natural tendency for foreign judicial officials to equate U.S. suppression orders with a finding of torture. The understanding attempts to convey the idea that to determine whether torture occurred one must examine the facts that resulted in the suppression rather than merely relying on the fact of the suppression itself.

In our judgment the understandings are fair, relevant, and beneficial to all parties. Moreover, they can in no way be construed to benefit the public officials who actually engage in the practice of torture.

ARTICLE 3—EXTRADITION AND DEPORTATION

Article 3 is the article that will perhaps have the most day to day impact upon law enforcement activity in the United States. The United States does not, and we trust would never, extradite or deport a person to a country where it was known that he would be tortured. However, Article 3 could, in conjunction with a broad definition of torture, cause major difficulties for the enforcement of our extradition and deportation laws unless the applicable standard is clearly enunciated and the definition is properly understood.

There is no doubt that Article 3 places an obligation upon the competent authorities of the United States not to deliver an individual to a country where he would be tortured. Under our existing law, the "competent authorities" for ensuring the execution of this obligation are the Secretary of State for extradition and the Attorney General for deportation. Article 3 does not require that such determinations be made subject to judicial review. The determiners and the degree of review, if any, are left by the Convention to internal domestic law.

Because Article 3 does not permit any discretion or provide for any exceptions, it is not completely analogous to current immigration law where withholding of deportation allows exceptions (8 U.S.C. Sec. 1253(h)) and the granting of asylum provides discretion to those who meet the threshold requirements (8 U.S.C. Sec. 1158). In application, Article 3 would prevent a torturer from being sent back to a country which would repay him in kind for his misdeeds. Because of the lack of discretion and any exceptions, it is important that Article 3 be properly understood. Our proposed understanding sets the appropriate standard. The standard is comparable to that utilized under deportation (*i.e.*, "more likely than not," 8 U.S.C. Sec. 1253(h)). *See I.N.S.* v. *Stevic*, 467 U.S. 407 (1984). Because there is no discretion under Article 3, the lower standard that exists for asylum (*i.e.*, "well founded fear of prosecution," 8 U.S.C. Sec. 1158) is simply inappropriate. See *I.N.S.* v. *Cardoza-Fonseca*, U.S. (1987), 107 S.Ct. 1207.

ARTICLE 16—MEANING OF CRUEL, INHUMAN, OR DEGRADING

We have proposed a reservation applicable to Article 16. The reservation would define our obligations under that Article in terms of the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States. We have proposed this reservation because the terms "cruel, inhuman or degrading treatment or punishment" used in the Convention are vague and are not evolved concepts under international law. This is especially the case concerning the scope of what constitutes degrading treatment. Moreover, the little international case law that exists is based almost solely upon the conditions in certain Western European countries which may not always be analogous to or appropriate for the United States. On the other hand, the concept of cruel and unusual punishment under the United States Constitution is well developed, having evolved through court decisions over a period of 200 years. These standards are gleaned from various objective indicia of community values, including legislative and congressional judgments, sentences imposed by juries, prior case law, public opinion, and international practices. Hence, in our judgment, even with this modest reservation the United States will clearly remain a leader in the human rights field.

Judge Sofaer has discussed with you another understanding that the Administration wishes to propose to be included to the Torture Convention. Department of Justice supports this addition.

The CHAIRMAN. Thank you very much, indeed.

I would address this question to either Judge Sofaer or Mr. Richard. Maybe Judge Sofaer.

The Reagan administration transmitted 19 separate conditions. This has now been reduced to 12 conditions. Could you provide the committee with the conditions that have been adopted or proposed by our allies with respect to this convention?

Mr. SOFAER. We do have in printed form a set of those materials of conditions, reservations, understandings, that have been proposed by other states. And we could supply that to the committee, Mr. Chairman.

The CHAIRMAN. Thank you very much.

[The information referred to follows:]

IV 9 Torture and other cruel, inhuman or degrading treatment or punishment

9 CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Adopted by the General Assembly of the United Nations on 10 December 1984

ENTRY INTO FORCE 26 June 1987, in accordance with article 27(1)[1]
REGISTRATION 26 June 1987
TEXT A/RES/39/46

Note The Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, was adopted by resolution 39/46[2] of 10 December 1984 at the thirty-ninth session of the General Assembly of the United Nations. The Convention is open for signature by all States, in accordance with its article 25.

Participant	Signature	Ratification, accession (a)
Afghanistan	4 Feb 1985	1 Apr 1987
Algeria	26 Nov 1985	
Argentina	4 Feb 1985	24 Sep 1986
Australia	10 Dec 1985	
Austria	14 Mar 1985	29 Jul 1987
Belgium	4 Feb 1985	
Belize		17 Mar 1986 a
Bolivia	4 Feb 1985	
Brazil	23 Sep 1985	
Bulgaria	10 Jun 1986	16 Dec 1986
Byelorussian SSR	19 Dec 1985	13 Mar 1987
Cameroon		19 Dec 1986 a
Canada	23 Aug 1985	24 Jun 1987
Chile	23 Sep 1987	30 Sep 1988
China	12 Dec 1986	4 Oct 1988
Colombia	10 Apr 1985	8 Dec 1987
Costa Rica	4 Feb 1985	
Cuba	27 Jan 1986	
Cyprus	9 Oct 1985	
Czechoslovakia	8 Sep 1986	7 Jul 1988
Denmark	4 Feb 1985	27 May 1987
Dominican Republic	4 Feb 1985	
Ecuador	4 Feb 1985	30 Mar 1988
Egypt		25 Jun 1986 a
Finland	4 Feb 1985	
France	4 Feb 1985	18 Feb 1986
Gabon	21 Jan 1986	
Gambia	23 Oct 1985	
German Democratic Republic	7 Apr 1986	9 Sep 1987
Germany, Federal Republic of	13 Oct 1986	
Greece	4 Feb 1985	6 Oct 1988
Guinea	30 May 1986	
Guyana	25 Jan 1988	19 May 1988
Hungary	28 Nov 1986	15 Apr 1987
Iceland	4 Feb 1985	
Indonesia	23 Oct 1985	
Israel	22 Oct 1986	
Italy	4 Feb 1985	
Liechtenstein	27 Jun 1985	
Luxembourg	22 Feb 1985	29 Sep 1987
Marocco	8 Jan 1986	
Mexico	18 Mar 1985	23 Jan 1986
Netherlands	4 Feb 1985	21 Dec 1988[3]
New Zealand	14 Jan 1986	
Nicaragua	15 Apr 1985	
Nigeria	28 Jul 1988	
Norway	4 Feb 1985	9 Jul 1986
Panama	22 Feb 1985	24 Aug 1987
Peru	29 May 1985	7 Jul 1988
Philippines		18 Jun 1986 a
Poland	13 Jan 1986	
Portugal	4 Feb 1985	
Senegal	4 Feb 1985	21 Aug 1986
Sierra Leone	18 Mar 1985	
Spain	4 Feb 1985	21 Oct 1987
Sudan	4 Jun 1986	
Sweden	4 Feb 1985	8 Jan 1986
Switzerland	4 Feb 1985	2 Dec 1986
Togo	25 Mar 1987	18 Nov 1987
Tunisia	26 Aug 1987	23 Sep 1988
Turkey	25 Jan 1988	2 Aug 1988
Uganda		3 Nov 1986 a
Ukrainian SSR	27 Feb 1986	24 Feb 1987
Union of Soviet Socialist Republics	10 Dec 1985	3 Mar 1987
United Kingdom	15 Mar 1985	8 Dec 1988[4]
United States of America	18 Apr 1988	
Uruguay	4 Feb 1985	24 Oct 1986
Venezuela	15 Feb 1985	

Declarations and Reservations

(Unless otherwise indicated, the declarations and reservations were made upon ratification or accession)

AFGHANISTAN

While ratifying the above-mentioned Convention, the Democratic Republic of Afghanistan, invoking paragraph 1 of the Article /8, of the Convention, does not recognize the authority of the committee as foreseen in the article 20 of the Convention.

Also according to paragraph 2 of the article 30, the Democratic Republic of Afghanistan, will not be bound to honour the provisions of paragraph 1 of the same article since according to that paragraph 1 the compulsory submission of disputes in connection with interpretation or the implementation of the provisions of this Convention by one of the parties concerned to the International Court of Justice is deemed possible. Concerning to this matter, it declares that the settlement of disputes between the States Parties, such disputes may be referred to arbitration or to the International Court of Justice with the consent of all the Parties concerned and not by one of the Parties.

AUSTRIA

1 "Austria will establish its jurisdiction in accordance with article 5 of the Convention irrespective of the laws applying to the place where the offence occurred, but in respect of paragraph 1(c) only if prosecution by a State having jurisdiction under paragraph 1(a) or paragraph 1(b) is not to be expected.

2 Austria regards article 15 as the legal basis for the inadmissibility provided for therein of the use of statements which are established to have been made as a result of torture."

BULGARIA

Reservations made upon signature and confirmed upon ratification:

1 Pursuant to article 28 of the Convention, the People's Republic of Bulgaria states that it does not recognize the competence of the Committee against Torture provided for in article 20 of the Convention, as it considers that the provisions of article 20 are not consistent with the principle of respect for sovereignty of the States - parties to the Convention.

2 Pursuant to article 30, paragraph 2 of the Convention, the People's Republic of Bulgaria states that it does not consider itself bound by the provisions of article 30, paragraph 1 of the Convention, establishing compulsory jurisdiction of international arbitration or the International Court of Justice in the settlement of disputes between States - parties to the Convention. The People's Republic of Bulgaria maintains its position that disputes between two or more States can be submitted for consideration and settlement by international arbitration or the International Court of Justice only provided all parties to the dispute, in each individual case, have explicitly agreed to that.

BYELORUSSIAN SOVIET SOCIALIST REPUBLIC

Reservations made upon signature and confirmed upon ratification:

1 The Byelorussian Soviet Socialist Republic does not recognize the competence of the Committee against Torture as defined by article 20 of the Convention.

2 The Byelorussian Soviet Socialist Republic does not consider itself bound by the provisions of paragraph 1 of article 30 of the Convention.

CHILE

Upon signature

1 The Government of Chile does not recognize the competence of the Committee against Torture provided for in article 20.

2 The Government of Chile does not consider itself bound by the provisions of article 30, paragraph 1, of the Convention.

3 The Government of Chile reserve the right to formulate, upon ratifying the Convention, any declarations or reservations it may deem necessary in the light of its domestic law.

Upon ratification

Reservations:

(a) [(b)] Article 2, paragraph 3, in so far as it modifies the principle of obedience upon receipt [article 1 of Chilean domestic law]. The Government of Chile will apply the provisions of that international norm to subordinate personnel governed by the Code of Military Justice, provided that the order patently intended to lead to perpetration of the acts referred to in article 1 is not insisted on by the superior officer after being challenged by his subordinate.

(b) Article 3, by reason of the discretionary and subjective nature of the terms in which it is drafted.

(c) The Government of Chile declares that in its relations with American States that are Parties to the Inter-American Convention to Prevent and Punish Torture, it will apply that Convention in cases where its provisions are incompatible with those of the present Convention.

(d) As provided for in article 28, paragraph 1, the Government of Chile does not recognize the competence of the Committee against Torture as defined by article 20 of the Convention.

(e) The Government of Chile will not consider itself bound by the provisions of article 30, paragraph 1 of the Convention.

CHINA

Reservations made upon signature and confirmed upon ratification:

"(1) The Chinese Government does not recognize the competence of the Committee against Torture as provided for in article 20 of the Convention.

(2) The Chinese Government does not consider itself bound by paragraph 1 of article 30 of the Convention."

CZECHOSLOVAKIA

Reservation made upon signature and confirmed upon ratification:

"The Czechoslovak Socialist Republic does not recognize the competence of the Committee against Torture as defined by article 20 of the Convention and it does not consider itself bound by the provisions of paragraph 1 of article 30 of the Convention."

ECUADOR

Reservation:

Ecuador declares that, in accordance with the provisions of article 42 of its Political Constitution, it will not permit extradition of its nationals.

FRANCE

Reservation:

The Government of France declares in accordance with article 30, paragraph 2, of the Convention, that it shall not be bound by the provisions of paragraph 2 of [article 30].

GERMAN DEMOCRATIC REPUBLIC

Reservations made upon signature and confirmed upon ratification:

The German Democratic Republic declares in accordance with article 28, paragraph 1 of the Convention that it does not recognize the competence of the Committee provided for in article 20.

The German Democratic Republic declares in accordance with article 30, paragraph 2 of the Convention that it does not consider itself bound by paragraph 1 of this article.

Declaration made upon ratification:

The German Democratic Republic declares that it will bear its share only of those expenses in accordance with article 17, paragraph 7, and article 18, paragraph 5, of the Convention arising from activities under the competence of the Committee as recognized by the German Democratic Republic.[5]

GERMANY, FEDERAL REPUBLIC OF

Upon signature:

The Government of the Federal Republic of Germany reserves the right to communicate, upon ratification, such reservations or declarations of interpretation as are deemed necessary especially with respect to the applicability of article 3.

HUNGARY

Reservations made upon signature and confirmed upon ratification:

The Hungarian People's Republic does not recognize the competence of the Committee against Torture as defined by article 20 of the Convention.

The Hungarian People's Republic does not consider itself bound by the provisions of paragraph 1 of article 30 of the Convention.

LUXEMBOURG

Interpretative declaration:

Article 1

The Grand Duchy of Luxembourg hereby declares that the only "lawful sanctions" that it recognizes within the meaning of article 1, paragraph 1, of the Convention are those which are accepted by both national law and international law.

MOROCCO

Upon signature:

In accordance with article 28, paragraph 1, the Government of the Kingdom of Morocco declares that it does not recognize the competence of the Committee provided for in article 20.

In accordance with article 30, paragraph 2, the Government of the Kingdom of Morocco declares further that it does not consider itself bound by paragraph 1 of the same article.

NETHERLANDS

Interpretative declaration with respect to article 1:

"It is the understanding of the Government of the Kingdom of the Netherlands that the term "lawful sanctions" in article 1, paragraph 1, must be understood as referring to those sanctions which are lawful not only under national law but also under international law."

PANAMA

The Republic of Panama declares in accordance with article 30, paragraph 2 of the Convention that it does not consider itself bound by the provisions of paragraph 1 of the said article.

POLAND

Upon signature:

Under article 28, the Polish People's Republic does not consider itself bound by article 20 of the Convention.

Furthermore, the Polish People's Republic does not consider itself bound by article 30, paragraph 1, of the Convention.

TOGO

Upon signature:

The Government of the Togolese Republic reserves the right to formulate, upon ratifying the Convention, any reservations or declarations which it might consider necessary.

TUNISIA

Upon signature:

The Government of Tunisia reserves the right to make at some later stage any reservation or declaration which it deems necessary, in particular with regard to articles 20 and 21 of the said Convention.

Upon ratification:

[The Government of Tunisia] confirms that the reservations made at the time of signature of the Convention on Tunisia's behalf on 26 August 1987 have been completely withdrawn.

TURKEY

Reservation:

"The Government of Turkey declares in accordance with article 30, paragraph 2, of the Convention, that it does not consider itself bound by the provisions of paragraph 1 of this article."

UKRAINIAN SOVIET SOCIALIST REPUBLIC

Reservations made upon signature and confirmed upon ratification:

[Same reservations, mutatis mutandis, as those made by the Byelorussian Soviet Socialist Republic.]

UNION OF SOVIET SOCIALIST REPUBLICS

Reservations made upon signature and confirmed upon ratification:

[Same reservations, mutatis mutandis, as those made by the Byelorussian Soviet Socialist Republic.]

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Upon signature:

"The United Kingdom reserves the right to formulate, upon ratifying the Convention, any reservations or interpretative declarations which it might consider necessary."

UNITED STATES OF AMERICA

Upon signature:

"The Government of the United States of America reserves the right to communicate, upon ratification, such reservations, interpretive understandings, or declarations as are deemed necessary."

Declarations recognizing the competence of the Committee against torture under articles 21 and 22

ARGENTINA

...The Argentine Republic recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. It also recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention.

AUSTRIA

" ... Austria recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention.

... Austria recognizes the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to Austrian jurisdiction who claim to be victims of a violation of the provisions of the Convention."

DENMARK

"The Government of Denmark [...] recognizes the competence of the Committee to receive and consider communications to the effect that the State Party claims that another State Party is not fulfilling its obligations under this Convention.

The Government of Denmark [...] recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

ECUADOR

6 September 1988

The Ecuadorian State, pursuant to article 21 of the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention, it also recognizes in regard to itself the competence of the Committee, in accordance with article 21.

It further declares, in accordance with the provisions of article 22 of the Convention, that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention.

FRANCE

The Government of France declares [...] that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention.

The Government of France declares [...] that it recognizes the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention.

GREECE

Article 21

The Hellenic Republic declares, pursuant to article 21, paragraph 1, of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention.

Article 22

The Hellenic Republic declares, pursuant to article 22, paragraph 1, of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claims to be victims of a violation by a State Party of the provisions of the Convention.

LUXEMBOURG

Article 21

The Grand Duchy of Luxembourg hereby declares [...] that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention.

Article 22

The Grand Duchy of Luxembourg hereby declares [...] that it recognizes the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention.

NETHERLANDS

"With respect to article 21

The Government of the Kingdom of the Netherlands hereby declares that it recognizes the competence of the Committee against Torture under the conditions laid down in article 21, to receive and consider communications to the effect that another State Party claims that the Kingdom is not fulfilling its obligations under this Convention.

With respect to article 22

The Government of the Kingdom of the Netherlands hereby declares that it recognizes the competence of the Committee against Torture, under the conditions laid down in article 22, to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by the Kingdom of the provisions of the Convention."

NORWAY

" Norway recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention.

Norway recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention "

SPAIN

Spain declares that, pursuant to article 21, paragraph 1, of the Convention, it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that the Spanish State is not fulfilling its obligations under this Convention. It is Spain's understanding that, pursuant to the above-mentioned article, such communications shall be accepted and processed only if they come from a State Party which has made a similar declaration.

Spain declares that, pursuant to article 22, paragraph 1, of the Convention, it recognizes the competence of the Committee to receive and consider communications sent by, or on behalf of, persons subject to Spanish jurisdiction who claim to be victims of a violation by the Spanish State of the provisions of the Convention. Such communications must be consistent with the provisions of the above-mentioned article and, in particular, of its paragraph 5.

SWEDEN

"Sweden recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention.

Sweden recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention "

SWITZERLAND

(A) Pursuant to the Federal Decree of 6 October 1986 on the approval of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Federal Council declares, in accordance with article 21, paragraph 1, of the Convention, that Switzerland recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that Switzerland is not fulfilling its obligations under this Convention.

(B) Pursuant to the above-mentioned Federal Decree, the Federal Council declares, in accordance with article 22, paragraph 1, of the Convention, that Switzerland recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by Switzerland of the provisions of the Convention.

TOGO

The Government of the Republic of Togo recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention.

The Government of the Republic of Togo recognizes the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention.

TUNISIA

[The Government of Tunisia] declares that it recognizes the competence of the Committee Against Torture provided for in article 17 of the Convention to receive communications pursuant to articles 21 and 22, thereby withdrawing any reservation made on Tunisia's behalf in this connection.

TURKEY

"The Government of Turkey declares, pursuant to article 21, paragraph 1, of the Convention that it recognizes the competence of the Committee Against Torture to receive and consider communications to the effect that a State Party is not fulfilling its obligations under the Convention.

The Government of Turkey declares, pursuant to article 22, paragraph 1, of the Convention that it recognizes the competence of the Committee Against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention "

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

"The Government of the United Kingdom declares under article 21 of the said Convention that it recognizes the competence of the Committee Against Torture to receive and consider communications submitted by another State Party, provided that such other State Party has, not less than twelve months prior to the submission by it of a communication in regard to the United Kingdom, made a declaration under article 21 recognizing the competence of the Committee to receive and consider communications in regard to itself "

URUGUAY

27 July 1988

The Government of Uruguay recognizes the competence of the Committee Against Torture to receive and consider communications referring to the said articles [21 and 22].

Objections

Unless otherwise indicated, the objections were made upon ratification or accession.)

AUSTRIA

29 September 1988

"The Declaration entered upon ratification by the German Democratic Republic - which stipulates that the German Democratic Republic would bear her share only of those expenses in accordance with art. 17, para. 7, and art. 18, para 5, of the Convention arising from activities under the competence of the Committee against Torture as recognized by the German Democratic Republic - cannot alter or modify, in any respect, the obligations arising from that Convention for all States Parties thereto."

CANADA

5 October 1988

The Government of Canada hereby formally objects to the declaration made by the German Democratic Republic when ratifying the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in which it declares that it will bear its share only of those expenses in accordance with article 17, paragraph 7, and article 18, paragraph 5, of the Convention arising from activities under the competence of the Committee against Torture as recognized by the German Democratic Republic.

The Government of Canada considers that this declaration is incompatible with the object and purpose of the Convention against Torture, and thus inadmissible under article 19 (c) of the Vienna Convention on the Law of Treaties. Through its functions and its activities, the Committee against Torture plays an essential role in the execution of the obligations of States parties to the Convention against Torture. Any restriction whose effect is to hamper the activities of the Committee would thus be incompatible with the object and purpose of the Convention.

DENMARK

29 September 1988

"The Government of Denmark hereby enters its formal objection to [the declaration made by the Government of the German Democratic Republic] which it considers to be a unilateral statement with the purpose of modifying the legal effect of certain provisions of the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment in their application to the German Democratic Republic. It is the position of the Government of Denmark that the said declaration has no legal basis in the Convention or in international treaty law.

This objection is not an obstacle to the entry into force of the said Convention between Denmark and the German Democratic Republic.

FRANCE

23 June 1988

France makes an objection to [the declaration made by the Government of the German Democratic Republic] which it considers contrary with the object and purpose of the Convention.

The said objection is not an obstacle to the entry into force of the said Convention between France and the German Democratic Republic.

GREECE

The Hellenic Republic raises an objection to [the declaration made by the Government of the German Democratic Republic], which it considers to be in violation of article 19, paragraph (b), of the Vienna Convention on the Law of Treaties. The Convention against Torture expressly sets forth in article 28, paragraph 1, and article 30, paragraph 2, the reservations which may be made. The declaration of the German Democratic Republic is not, however, in conformity with these specified reservations.

This objection does not preclude the entry into force of the said Convention as between the Hellenic Republic and the German Democratic Republic.

LUXEMBOURG

9 September 1988

Upon its ratification, on 9 September 1987, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the German Democratic Republic made the following declaration: "The German Democratic Republic declares that it will bear its share only of those expenses in accordance with article 17, paragraph 7, and article 18, paragraph 5, of the Convention arising from activities under the competence of the Committee as recognized by the German Democratic Republic."

The Grand Duchy of Luxembourg objects to this declaration, which it deems to be a reservation the effect of which would be to inhibit activities of the Committee in a manner incompatible with the purpose and the goal of the Convention.

The present objection does not constitute an obstacle to the entry into force of the said Convention between the Grand Duchy of Luxembourg and the German Democratic Repubulic.

NETHERLANDS

"The Government of the Kingdom of the Netherlands hereby declares that it objects to the declaration made by the German Democratic Republic upon its ratification of the Convention by which it states that it would bear its share only of those expenses that - in accordance with article 17, paragraph 7, and article 18, paragraph 5, of the Convention - arise from activities under the competence of the Committee against Torture as recognized by that State.

This declaration, clearly a reservation according to article 2, paragraph 1, under (d), of the Vienna Convention on the Law of Treaties, not only "purports to exclude or modify the legal effect" of articles 17, paragraph 7, and 18,

paragraph 5, of the present Convention in their application to the German Democratic Republic itself, but it would also affect the obligations of the other States Parties which would have to pay additionally in order to ensure the proper functioning of the Committee against Torture. For this reason the reservation is not acceptable to the Government of the Kingdom of the Netherlands.

Thus, the assessment of the financial contributions of the States Parties to be made under article 17, paragraph 7, and article 18, paragraph 5, must be drawn up in disregard of the declaration of the German Democratic Republic."

NORWAY

29 September 1988

"The Government of Norway has examined the content of the declaration made by the German Democratic Republic upon ratification of the Convention by which "the German Democratic Republic declares that it will bear its share only of those expenses in accordance with article 17, paragraph 7, and article 18, paragraph 5, of the Convention arising from activities under the competence of the Committee as recognized by the German Democratic Republic".

The Government of Norway cannot accept this declaration entered by the German Democratic Republic. The Government of Norway considers that any such declaration is without legal effect, and cannot in any manner diminish the obligation of a government to contribute to the costs of the Committee in conformity with the provisions of the Convention."

SPAIN

6 October 1988

The Government of the Kingdom of Spain declares that it objects to the reservation made by the German Democratic Republic, in ratifying the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to the effect that it will be responsible for only those expenses which, under article 17, paragraph 7, and article 18, paragraph 5, are incurred in connection with activities of the Committee whose competence it has recognized. The Government of the Kingdom of Spain feels that such a reservation is a violation of article 19, paragraph (b), of the Vienna Convention on the Law of Treaties of 23 May 1969, because the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment sets forth, in article 28, paragraph 1, and article 30, paragraph 2, the only reservations that may be made to the Convention, and the above-mentioned reservation of the German Democratic Republic does not conform to either of those reservations.

SWEDEN

28 September 1988

"The Government of Sweden has examined the content of the declaration made by the German Democratic Republic, by which "The German Democratic Republic declares that it will bear its share only of those expenses in accordance with article 17, paragraph 7, and article 18, paragraph 5, of the Convention arising from activities under the competence of the Committee as recognized by the German Democratic Republic".

According to article 2, paragraph 1(d) of the Vienna Convention on the Law of Treaties, a unilateral statement, whereby a State e.g. when ratifying a treaty purports to exclude the legal effect of certain provisions of the treaty in their application, is regarded as a reservation. Thus, such unilateral statements are considered as reservations regardless of their name or phrase.

The Government of Sweden has come to the conclusion that the declaration made by the German Democratic Republic is incompatible with the object and purpose of the Convention and therefore is invalid according to article 19(c) of the Vienna Convention on the Law of Treaties. For this reason the Government of Sweden objects to this declaration."

SWITZERLAND

7 October 1988

The Swiss Government objects to the reservation by the German Democratic Republic to the effect that that State will bear its share only of those expenses in accordance with article 17, paragraph 7, and article 18, paragraph 5, of the Convention arising from activities under the competence of the Committee as recognized by the German Democratic Republic. That reservation is contrary to the purpose and aims of the Convention which are, through the Committee's activities, to encourage respect for a vitally important human right and to enhance the effectiveness of the struggle against torture the world over. This objection does not have the effect of preventing the Convention from entering into force between the Swiss Confederation and the German Democratic Republic.

NOTES

1/ Including the provisions of articles 21 and 22 concerning the competence of the Committee against Torture, more than five States having, prior to that date, declared that they recognized the competence of the Committee against Torture, in accordance with the said articles.

2/ Official Records of the General Assembly of the United Nations, Thirty-ninth Session, Supplement No. 51 (A/39/51), p. 19.

3/ For the Kingdom in Europe, the Netherlands Antilles and Aruba.

4/ For the United Kingdom of Great Britain and Northern Ireland, Anguilla, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Monserrat, Pitcairn, Henderson, Ducie and Oeno Islands, Saint Helena, Saint Helena Dependencies, and Turks and Caicos Islands.

5/ In a letter accompanying its instrument of ratification, the Government of the United Kingdom of Great Britain and Northern Ireland made the following declaration regarding the declaration made by the Government of the German Democratic Republic:

"The Government of the United Kingdom of Great Britain and Northern Ireland has taken note of the reservations formulated by the Government of the German Democratic Republic pursuant to article 28, paragraph 1, and article 30, paragraph 2, respectively, and the declaration made by the German Democratic Republic with reference to article 17, paragraph 7, and article 18, paragraph 5. It does not regard the said declaration as affecting in any way the obligations of the German Democratic Republic as a State Party to the Convention (including the obligations to meet its share of the expenses of the Committee on Torture as apportioned by the first meeting of the States Parties held on 26 November 1987 or any subsequent such meetings) and do not accordingly raise objections to it. It reserves the rights of the United Kingdom in their entirety in the event that the said declaration should at any future time be claimed to affect the obligations of the German Democratic Republic as aforesaid."

Enclosure USAM A102

(IV.9)

UNITED NATIONS NATIONS UNIES

POSTAL ADDRESS- ADRESSE POSTALE: UNITED NATIONS, N.Y. 10017
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE: UNATIONS NEWYORK

REFERENCE: C.N.29.1989.TREATIES-2 (Depositary Notification)

CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, ADOPTED BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS ON 10 DECEMBER 1984

WITHDRAWAL OF A RESERVATION MADE BY THE UNION OF SOVIET SOCIALIST REPUBLICS UPON RATIFICATION

The Secretary-General of the United Nations, acting in his capacity as depositary, and referring to depositary notification C.N.41.1987.TREATIES-1 of 16 April 1987 concerning, inter alia, the ratification by the Government of the Union of Soviet Socialist Republics, with reservations, of the above-mentioned Convention, communicates the following:

In a communication received on 8 March 1989, the Government of the Union of Soviet Socialist Republics notified the Secretary-General that it has decided to withdraw the reservation relating to article 30 (1) made upon ratification, which reservation read as follows:

(Translation) (Orginal: Russian)

The Union of Soviet Socialist Republics does not consider itself bound by the provisions of article 30, paragraph 1, of the Convention.

..... A translation of the said communication is transmitted herewith.

24 March 1989

Attention: Treaty Services of Ministries of Foreign Affairs and of international organizations concerned

Translated from Russian

Letter dated 28 February 1989 from the Minister for Foreign Affairs of the USSR addressed to the Secretary-General

The Soviet Union, which attaches great importance in present circumstances to enhancing the role of the International Court of Justice in world affairs, has begun to consider the question of withdrawing the reservations which it made previously to a number of international treaties concerning the jurisdiction of that judicial organ. Given the importance of the further promotion of co-operation among States in the humanitarian sphere, it was deemed desirable to begin this process by dealing with human rights agreements. In this connection, in his address to the United Nations on 7 December 1988, Mr. M. S. Gorbachev advocated that all States should recognize the compulsory jurisdiction of the International Court of Justice with respect to the interpretation and application of human rights agreements.

In the light of the above, on 10 February 1989, the Presidium of the Supreme Soviet of the USSR adopted a decree whereby the Soviet Union accepts the compulsory jurisdiction of the International Court of Justice in respect of the following international treaties: the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, the 1952 Convention on the Political Rights of Women, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, the 1979 Convention on the Elimination of All Forms of Discrimination against Women, and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

By this decree, the Soviet Union declares that the relevant provisions of these treaties shall apply to disputes concerning the interpretation and application of the treaties in cases which may arise after the date on which the Secretary-General is notified of the withdrawal by the USSR of its reservations.

Thus, in accordance with the decree, disputes which may arise in the future between the Soviet Union and States parties to the above treaties with respect to the interpretation and application of these treaties may, from the date of this letter, be referred to the International Court of Justice at the request of one of the parties to the dispute.

In taking this decision, the Soviet Union was guided by the desire to strengthen the international legal order, which upholds the primacy of law in political affairs. In advocating the primacy of international law, we take the position that international legal norms and obligations of States take precedence over their domestic enactments. Naturally, this approach also presupposes the comprehensive use of all means of peaceful settlement of disputes, including active use of the potential of the International Court of Justice.

(3)

I request you, as the depositary of the above-mentioned treaties, to notify the States parties of the contents of this letter.

I also request you to have this letter distributed as an official document of the United Nations.

E. SHEVARDNADZE

(IV.9)

UNITED NATIONS NATIONS UNIES

POSTAL ADDRESS— ADRESSE POSTALE: UNITED NATIONS, N.Y. 10017
CABLE ADDRESS— ADRESSE TELEGRAPHIQUE: UNATIONS NEWYORK

REFERENCE: C.N.92.1989.TREATIES-5 (Depositary Notification)

CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, ADOPTED BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS ON 10 DECEMBER 1984

OBJECTION BY ARGENTINA TO THE APPLICATION OF THE CONVENTION TO THE FALKLAND ISLANDS (MALVINAS) BY THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND UPON RATIFICATION

The Secretary-General of the United Nations, acting in his capacity as depositary, and referring to depositary notification C.N.303.1988.TREATIES-15 of 2 February 1989 concerning, inter alia, the ratification of the above-mentioned Convention by the United Kingdom of Great Britain and Northern Ireland, with a declaration of territorial application, inter alia to the Falkland Islands, communicates the following:

On 14 April 1989, the Secretary-General received from the Government of Argentina the following objection:

(Translation) (Original: Spanish)

The Government of Argentina reaffirms its sovereignty over the Malvinas Islands, which form part of its national territory, and, with regard to the Malvinas Islands, formally objects to and rejects the declaration of territorial extension issued by the United Kingdom of Great Britain and Northern Ireland in the instrument of ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, deposited with the Secretary-General of the United Nations on 8 December 1988.

The General Assembly of the United Nations adopted resolutions 2065 (XX), 3160 (XXVIII), 31/49, 37/9, 38/12 and 39/6 in which it recognizes the existence of a sovereignty dispute regarding the question of the Malvinas Islands and has repeatedly requested the Argentine Republic and the United Kingdom of Great Britain and Northern Ireland to resume negotiations in order to find as soon as possible a peaceful and definitive solution to the dispute and their remaining differences relating to that question, through the good offices of the Secretary-General. The General Assembly also adopted resolutions 40/21, 41/40, 42/19 and 43/25, which request the parties to initiate negotiations with a view to finding the means to resolve peacefully and definitively the problems pending between both countries, including all aspects on the future of the Malvinas Islan

12 June 1989

Attention: Treaty Services of Ministries of Foreign Affairs and of

(IV.9)

UNITED NATIONS NATIONS UNIES

POSTAL ADDRESS—ADRESSE POSTALE: UNITED NATIONS, N.Y. 10017
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE: UNATIONS NEWYORK

REFERENCE C.N.50.1989.TREATIES-3 (Depositary Notification)

CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, ADOPTED BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS ON 10 DECEMBER 1984

RATIFICATION BY PORTUGAL

OBJECTION BY PORTUGAL CONCERNING A DECLARATION MADE BY THE GERMAN DEMOCRATIC REPUBLIC UPON RATIFICATION

The Secretary-General of the United Nations, acting in his capacity as depositary, communicates the following:

I

On 9 February 1989, the instrument of ratification by the Government of Portugal of the above-mentioned Convention was deposited with the Secretary-General.

The instrument of ratification was accompanied by declarations by which the Government of Portugal recognizes the competence of the Committee against Torture under articles 21 and 22 of the Convention. The declarations read as follows:

(Original: English)

"Article 21

Portugal hereby declares, in accordance with article 21, paragraph 1, of the Convention, that it recognizes the competence of the Committee Against Torture to receive and consider communications to the effect that the State Party claims that another State Party is not fulfilling its obligations under this Convention.

Article 22

Portugal hereby declares, in accordance with article 22, paragraph 1 of the Convention, that it recognizes the competence of the Committee Against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of violation by a State Party of the provisions of the Convention."

Attention: Treaty Services of Ministries of Foreign Affairs and of

UNITED NATIONS NATIONS UNIES

In accordance with article 27 (2), the Convention entered into force for Portugal on 11 March 1989, i.e. the thirtieth day after the date of the deposit of its instrument.

II

Furthermore, the Government of Portugal made the following objection with regard to a declaration (see depositary notification C.N.232.1987.TREATIES-8 of 7 October 1987) made by the Government of the German Democratic Republic upon ratification of the said Convention. The objection reads as follows:

(Original: English)

"The Government of Portugal hereby presents its formal objection to the declaration made by G.D.R. when ratifying the Convention, in which [it] declares that it will bear its share only of those expenses in accordances with article 17, paragraph 7, and article 18, paragraph 5 of the Convention, arising from activities under the competence of the Committee Against Torture, as recognized by G.D.R.

The Government of Portugal considers that this declaration is incompatible with the object and purpose of the present Convention. This objection does not constitute an obstacle to the entry into force of the Convention between Portugal and G.D.R."

17 April 1989

A20 THURSDAY, FEBRUARY 1, 1990

The Washington Post

An Act Against Torture

SOME TREATIES and international agreements signed by the United States with good intentions—to outlaw genocide, for example, or to advance human rights—run into trouble when they are sent to the Senate for approval. The U.N. Convention Against Genocide was under consideration for about 40 years while various legislators raised fears that ratification would lead to Americans' being tried in foreign courts because this country's schools were segregated or because U.S. forces had intervened in Vietnam. Other agreements, such as those that would bar race and sex discrimination, were signed more than 10 years ago but have still not been ratified. A better fate appears to be in store for an international agreement on torture, which is being considered by the Senate Foreign Relations Committee.

The Convention on Torture was drafted in the United Nations and adopted unanimously by the General Assembly in December 1984. It established a system for international cooperation in the criminal prosecution of torturers by requiring each signatory nation either to prosecute such individuals found within its territory or extradite them for prosecution elsewhere. The United States signed the agreement in 1988, and the Bush administration has put a high priority on its ratification. It is hard to imagine that anyone could object to the purpose of the agreement, but as the debate on the genocide convention illustrated, unwarranted fears can be generated about the rights of individual Americans and this country's sovereignty that create confusion, delay and even opposition.

Supporters of the convention, which include Amnesty International, the American Bar Association and numerous church and human rights groups, have been working with the Justice Department and the State Department to minimize the number of declarations, reservations and understandings that may be adopted before the Senate consents to ratification. These footnotes—reservations are the most serious—are helpful when the United States wants to clarify or limit the language of a treaty. But when they are not absolutely necessary they are not simply redundant but confusing to the public. With the exception of possible language concerning the applicability of the agreement to U.S. death penalty laws—unfortunately, it would not disturb them—it does not appear that there is any serious conflict on ratification.

It is necessary to concede that in some considerable measure these instruments of good will and good purpose are only paper declarations, cheerfully, if hypocritically subscribed to by some of the most brutal and offending governments in the world. But this doesn't mean that the United States should be on the wrong side of them or that they are without their diplomatic and legal value. Especially at a time when the demand for human rights is being successfully pursued around the world, the Senate should act quickly and affirmatively on the torture convention.

The CHAIRMAN. Has any other country suggested as many conditions the United States has?

Mr. SOFAER. No.

The CHAIRMAN. In connection with the reservations, the administration proposes a reservation exercising the option under article 30 to refrain from referring disputes to the ICJ. And I believe you justify this reservation on the need to conform with our prior withdrawal from the ICJ.

Now, would you consider this action consistent with U.S. support for the rule of law and the advancement of world peace through law?

To my mind it would be inconsistent with that position.

Mr. SOFAER. I do not agree, Mr. Chairman, and I urge you to reconsider that sense that you have.

We do submit to the rule of law in the world. It is our job, though, both in the executive branch and in the Senate, to consider whether it is fair and appropriate to submit the United States to adjudication before this particular court without further protections and procedures.

We believe in the ICJ. We participated in two cases recently, Mr. Chairman. We have agreed to participate with Iran in the Iran Air shoot down. We are negotiating a process among the five permanent members to utilize the court. And I have offered briefings of that process, and have conducted some briefings of that process.

We believe, Mr. Chairman, that in its present form and without adequate procedures, the use of the ICJ is inconsistent with the interests of the United States.

As attorneys that represent the United States, therefore, however much we may feel enamored of these general principles of international law and the rule of law in the world, we are looking for the mechanisms to make those general principles a reality that will nonetheless ensure fairness.

And there are things that have happened in the court, Mr. Chairman, over the last decade, that have created a sense that there need to be procedural protections and modifications. And that is what we are trying to do.

We are not trying to walk away from the court here, we are trying to, with the rest of the members of the permanent five, trying to reach a set of rules that will bring all the permanent five to the court, Mr. Chairman.

Right now, only Britain has a submission to the mandatory jurisdiction of the court. And their submission enables them to refuse to participate in any particular case right up to the moment it is actually filed.

So you can see, Mr. Chairman, this is not a view just of the United States.

The sense that there needs to be a set of procedures to protect sovereign nations who appear before the court is really quite widespread, and certainly felt by all permanent members. And that is what we are trying to work out, Mr. Chairman.

We are not trying to walk away from the court. On the contrary, we believe that the court will give this initiative its full blessing in due course.

The CHAIRMAN. What is the agreement that was reached between the United States and the Soviet Union with regard to jurisdiction of the World Court?

Mr. SOFAER. We reached agreement on a working paper of a set of procedures and practices. That working paper has been approved by the foreign ministers of both countries, and now is being discussed among the legal advisors of the five permanent members.

We have had one meeting, Mr. Chairman, and we are having our second meeting next month. The process is going forward in a constructive and mutually agreeable manner.

The CHAIRMAN. Thank you very much.

I would turn next to Senator Helms.

Senator HELMS. Mr. Chairman, these are two fine gentlemen. Judge Sofaer and I are friends. We have agreed to disagree agreeably from time to time. But he is a distinguished man and so is Mr. Richard.

They have testified effectively, but it just occurs to me that this is such a complicated subject that I hope this committee will not just have a hearing for the purpose of a hearing and then move along assuming everything is going to be all right.

For example, Mr. Chairman, I hope that we will have at least two other spokesmen for the administration, which, surprising to me, are not here this morning—Mr. Schifter, the Assistant Secretary of State of Human Rights; and Mr. Bolton, the Assistant Secretary of State for International Organizations.

Surely they must have some input in this thing.

I do not want to give short shrift to the complications of this. And I am going to get into a question or so, and 10 minutes is not much time to develop a line of questioning, as any lawyer knows. And I brag about not being a lawyer.

Let me start by asking if the genocide convention, as approved by Congress, is OK? Do you like that?

Mr. SOFAER. We were gratified and relieved, among other things, Senator Helms, when the genocide convention was finally approved.

Senator HELMS. And you could have had it approved years earlier if there had not been so much opposition to protecting the sovereignty of the United States.

Sam Ervin was arguing that, long before I lost my mind and ran for the Senate in 1972. And he stuck by the concept of sovereignty, sovereignty, sovereignty.

I think this is one reason that Sam got out of the ABA, because they had to be dragged, kicking and screaming, into agreeing that a sovereignty clause had to be in the Genocide Treaty. Sam won his point, but he was already dead by that time. But I tried to pick up where he left off.

And I tell you, you better check with the ABA and say, well, how much hell do we want to take on this thing? Will you agree to a sovereignty clause? You do not have one in here, do you?

Mr. SOFAER. No; Senator, we do not think it is necessary.

Senator HELMS. OK.

Let me just throw out a hypothetical question that was posed to me yesterday. I ask this just to see how this convention would work as is, with no further reservations.

Now let us suppose that the defense minister for Israel were to come to the United States, and the U.S. Government receives a request from the Yemen Democratic Republic, which is a ratifying party to this convention, right?

Mr. SOFAER. I believe so.

Senator HELMS. So Yemen says, arrest that defense minister, the charge being that the defense minister had authorized torture of Palestinians by the Israeli defense force in Judea and Samaria, which is the West Bank and Gaza.

Now South Yemen requests his extradition from the United States. And the convention, as I read it, as it now stands, requires that all ratifying parties must extradite or prosecute, one or the other, is that right?

Mr. SOFAER. Yes, Senator, but only in accordance with their own rules, including their evidentiary rules and the other procedural due process rules.

Senator HELMS. Well, what due process would you have?

Mr. SOFAER. We also have to have an extradition treaty. You have to have probable cause before you arrest anyone in the United States.

Senator HELMS. I understand that.

Mr. RICHARD. If I may, Senator. The process, as I see it on such a complaint, is the U.S. obviously would have to determine that there was an applicable extradition treaty.

In the case of Yemen, if my recollection serves me correctly, there is no treaty, so we could not, even if we were satisfied that there was sufficient evidentiary basis for an extradition, extradite absent an extradition treaty.

That would not end our obligation, though, under the convention, as I appreciate it. With the appropriate implementation of the provisions, we would still have the option, if the evidence was available, to prosecute this would-be torturer. And that would have to be decided on an evidentiary basis by our prosecuting authorities. That is the process.

Senator HELMS. Decided by whom?

Mr. RICHARD. By the Department of Justice in the normal course of its prosecutive activities, consistent with the criminal statutes that would be enacted implementing the relevant provisions of this convention, which call for universal jurisdiction.

Senator HELMS. Well, admittedly, my question was hypothetical, as I stated. But there are scores of questions that we need to analyze carefully, which were in fact analyzed over a period of 35 years by the United States Senate, with respect to the Genocide Treaty.

Let me ask you for openers, you said you have been working with the committee staff. One of you said that, and I do not believe that is accurate. You have sent my staff some papers, but have you sat down and said, what do you think about this?

Mr. SOFAER. Well, certainly, Senator, we have and we would. We have never hesitated.

Senator HELMS. Have you ever asked for or suggested a meeting?

Mr. SOFAER. I am sure that we have, Senator.

Senator HELMS. Let me suggest that your people get in touch with our people.

Mr. SOFAER. Certainly.

Senator HELMS. And sit down and work on some of these things.

Mr. SOFAER. Could I just say that the treaty makes very clear, Senator, that it is U.S. law and U.S. practice that will govern the practice of determining whether someone is subject to arrest, or subject to prosecution, or subject to extradition, or any other remedy.

The treaty clearly states that when the state party, under its law and procedures, decides that something needs to be done, it is done. And of course, if there is an individual, even from an ally, who engages, and there is probable cause to believe that he did engage in torture, under our system, that would be entirely appropriate that the person be taken into custody.

Senator HELMS. I do not want to lose my train of thought here.

Let me read you something. One of the reservations submitted reads: "The United States does not consider itself bound by article 3 insofar as it conflicts with the obligations of the United States towards states not party to the convention under the bilateral extradition treaties with such states."

Why did you delete that?

Mr. SOFAER. Because it was unnecessary, Senator. It clearly would be the practice. We could confirm that. The Department of Justice could confirm that.

Senator HELMS. Well, I have got your reason for deleting it right here. You say, and I do not believe this, you may believe it but I do not believe it. Here is your explanation for deletion: Upon further reflection, this provision was deemed unnecessary because it could be construed to indicate that the U.S. was retaining, insofar as it relates to non-parties, the judicial right to send a person back to a country where that person would be tortured. And such was never the intent.

Well, my time is up.

Mr. Chairman, let me ask you, would you be willing in a future hearing on this to have Mr. Schifter and Mr. Bolton to come up.

The CHAIRMAN. My understanding is this hearing is being held at the request of the administration, the administration sent Judge Sofaer and Mr. Richard here to speak to us.

Senator HELMS. Well, we are not limited to whoever the administration wants up here. The committee has some say so about who we want to have up here.

Mr. SOFAER. I just want to make it clear, Senator Helms, that Assistant Secretary Schifter or Assistant Secretary Bolton—it would have been perfectly appropriate for them to be here. They were offered an opportunity to be here, and they asked me to represent the Department. They asked me to represent the Department; and that is why I am here for them.

And they have reviewed and concur in the position that the administration has taken here today.

The CHAIRMAN. Thank you very much.

Senator Murkowski.

Senator MURKOWSKI. Thank you, Mr. Chairman. I will be very brief.

I gather that there are 72 signatories in that area and some 50 nations have already ratified this documentation. And we have requested the most exceptions or reservations, is that correct?

Mr. SOFAER. That is correct, Senator.

Senator MURKOWSKI. Now, since the administration is proposing that this be ratified subject to these reservations, what is likely to be the situation if we prevail with regard to the rest of the nations?

Will they go back and alter or put an addendum on the ratifications already taking place? Or are we just seeking ultimately a special set of circumstances for the United States as a condition for ratification?

Mr. SOFAER. They would have the right under the treaty to respond within a certain period to any reservation, understanding or declaration that we made. And some of them might. But we are not concerned with that.

We do not think that any of the reservations or understandings would cause any response by any of the states party that would negate the basic applications of the convention.

Senator MURKOWSKI. Nor would it, in your professional opinion, make it, because of our reservations, less effective, to the point that other countries would lose interest in the basic principle of developing a convention against torture?

Mr. SOFAER. Oh, definitely not, Senator. I think that our reservations—some of them are positively helpful. The definitional reservations and understandings I believe will be helpful over the long run.

Senator MURKOWSKI. We have seen some conservative elements, who, from the standpoint of balance, have a concern with any world government or world dictate over the United States that would be contrary to our Constitution.

Do you feel in this set of reservations that we have given ourselves adequate protection and that those that are concerned about those nuances are seeing their concerns adequately addressed?

Mr. SOFAER. Yes; Senator. Obviously there might be additional concerns that we have not thought of. We just sent one up, a capital punishment understanding. In the State Department, and in the administration, in fact, we believe international law does not prohibit the imposition of capital punishment. However, some individuals and groups in the administration strongly believe that this understanding could not hurt, and it might avoid problems in the future.

There are, if you will permit, Senator, some decisions from international courts, human rights courts in particular, which we think are wrong. The decision in the *Soering* case which claimed it was cruel, unusual and inhumane treatment to have a prisoner waiting in death row for several years is just unreasonable, we believe, and we do not adhere to it, and we will never adhere to it.

Here is a man who stayed on death row for 7 years or something like that because our due process system gave him a chance to appeal his conviction. So, we think that there might be occasion for reservations or understandings that we have not thought of. But, as of now, the ones that we have proposed we believe are adequate to protect the sovereignty of the United States.

Senator MURKOWSKI. If the United States goes ahead and adopts the recommendations currently before us, what is the time frame when this will all come into a formal convention under United Nations?

Mr. SOFAER. We would then prepare legislation.

Mr. RICHARD. It is my understanding that the convention is already in effect. There have been a sufficient number of signatories to bring the convention into effect.

We would hope to have prepared and submitted to Congress in a very short time after the Senate acts appropriate implementing legislation and once the legislation is passed, we would then deposit our instrument of ratification.

Senator MURKOWSKI. I want to make sure I understand you. The inference is that we do have a U.N. convention currently, but the 50 or so nations that have ratified it are participants in an ongoing convention that is in effect now.

Mr. SOFAER. Yes.

Senator MURKOWSKI. The 72 nations or the other 22 are in the same position as the United States, then, in the process of ratifying. Are we a signatory?

Mr. SOFAER. We are a signatory, yes.

Senator MURKOWSKI. But we have not ratified?

Mr. SOFAER. We have not ratified, not yet.

Senator MURKOWSKI. So, we would just become a party to, upon legislative action?

Mr. SOFAER. Right, because we do not want to submit our instruments of ratification until the Congress has adopted the legislation we need to implement this.

Senator MURKOWSKI. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much. I have no further questions. At this point I would turn to Senator Helms to see if he has any more.

Senator HELMS. I want to ask a few questions which are intended simply to illustrate what I think to be the weaknesses of this proposed convention. These were inherent in the genocide treaty as well. These are the kind of questions that Sam Ervin raised. Admittedly, he said he was just a country lawyer, but I thought he was a pretty good one.

We do have a crime of torture in the U.S. Code, do we not?

Mr. RICHARD. There is no specific torture statute. There are a variety of criminal statutes, both at the Federal and State levels, that would address that conduct which we are referring to as torture, whether it be in terms of assaults, civil rights statutes, and the like. So, we have adequate statutes, criminal statutes, to reach the conduct, sir.

Senator HELMS. And that would be the basis on which we would try or extradite alleged offenders, is that right?

Mr. RICHARD. Well, there is an area of coverage mandated by the convention in which we do not have existing legislation, and that relates to, among other things, activities by U.S. nationals abroad. We would not currently have jurisdiction over those activities, and the convention would mandate that we create jurisdiction. Likewise, we have no present jurisdiction over alleged torturous acts

committed by others abroad who are subsequently found in the United States. The so-called universal jurisdiction would have to be created by legislation.

Senator HELMS. I think my point just floated off.

Mr. RICHARD. I am sorry, Senator.

Senator HELMS. On what basis would we try or extradite alleged offenders?

Mr. SOFAER. Well, we could use the existing statute, Senator, but we plan to have additional criminal legislation adopted by the Congress making torture a crime.

Senator HELMS. But you do not know what that is now, do you?

Mr. SOFAER. No, we do not, Senator. I mean, we know pretty much what it will look like.

Senator HELMS. Well, I will tell you I am naive enough that I am even troubled by how you would define inhuman or degrading treatment. That is a broad, broad thing, How would you define it?

Mr. SOFAER. There is no criminal penalty for a violation of that provision. The violations of that part of the convention are treated in a radically different manner than the violations of the torture concept, and I agree with you, Senator. I think that that is a very vague phrase, and that is why we have proposed the reservation, as a reservation, not merely an understanding that that phrase be interpreted in the same manner as our cruel and unusual punishment clause in the Constitution.

Senator HELMS. All right. Hypothetically again, if a law enforcement official in New York tortures a suspect in custody in New York whose alleged criminal activity took place in New York, would this torture convention apply?

Mr. SOFAER. Yes.

Senator HELMS. Well, how does the so-called Federal-State reservation, to which you alluded, work? Can you explain that to a layman?

Mr. SOFAER. Well, in our system, as you know, Senator, there are some things that are done by our States and local governments and other things done by the Federal Government. The prosecution of crimes would continue to be handled at the local level in many respects. Extradition would be handled by the Department of Justice and, at a later stage, the Department of State.

We simply wanted to make clear that we would not be violating the convention if there were certain steps that had to be taken by local or state government under our constitutional system. It is really sort of a carving out of a piece of what you are so concerned about, Senator. It is saying to the world we have a constitutional system, and we just want you to know that in implementing this convention we are going to abide by our constitutional system of federalism in doing so.

We are still obliged to implement it, but it must be done consistent with the framework of the U.S. Constitution.

Senator HELMS. But that was the big hang up in the genocide convention for years and years, and years. Are you telling me now that you are willing to include a sovereignty clause, period, in this one, just as a previous administration finally agreed to include a sovereignty clause in the genocide treaty?

Mr. SOFAER. We believe such a clause is unnecessary.

Senator HELMS. Well, if it is not necessary, what harm would it do if it will satisfy old malcontents like me?

Mr. SOFAER. The harm that we believe it could do is that it could be raised by people in extradition hearings and criminal prosecutions as a defense where it really lacks any merit. But, we understand your feelings, Senator, and we are eager for this process to go forward, and we hope the committee will consider all of these matters and move the process along.

We do not want a repetition of the genocide convention, and I think the American Bar Association and the human rights groups also do not want a repetition of the genocide convention, and I hope this committee does not want a repetition of the genocide convention.

That is why we believe we should get together and work together to prevent that.

Senator HELMS. Well, I just told staff to get up a letter that will go to the Attorney General and to you, also, offering to sit down and work out these details because there is a multiplicity of them.

Mr. Chairman, may I ask one more question? I notice my time is up.

The CHAIRMAN. Certainly.

Senator HELMS. I might add that I am bothered that only four Senators have shown up this morning for this, and I commend Senator Murkowski, and my good Chairman, and Senator Pressler, but this is terribly important; and I think that we ought to insist that we have a good attendance by Senators. Otherwise they will say well, I am against torture, and they will vote for this convention. And if that was the only prerequisite, you know, I will vote against torture. I am against genocide. I was all along.

Let me turn now to understanding C which is on page 2 of your list of provisos. It says, "The United States understands that 'sanctions' includes judicially imposed sanctions and other enforcement actions authorized by United States or by judicial interpretation of such law provided that such sanctions or actions are not clearly prohibited under international law."

Now, does that understanding mean that international law is superior to domestic law?

Mr. SOFAER. Well, it would be with respect to anything that was torture because it would be part of domestic law.

If you adopt this treaty, it is not just international law. The standard becomes part of our law.

Senator HELMS. We go back to sovereignty now in the Constitution of the United States. Nothing, nothing as far as this Senator is concerned, supersedes the Constitution of the United States, and what you have told me seems to be a deviation from that.

Mr. SOFAER. Oh, no, Senator, no. It is part of the contemplated process within the Constitution. There is nothing unconstitutional about a prohibition on torture. Heavens no.

Senator HELMS. There you go again.

What I am saying is: Why cannot this understanding be written in comprehensible English? It is not.

I bet I could hand it to any one of the people back there in the audience, and they would ask what the hell does it mean.

And this is one of the things, Mr. Chairman, that I hope we can work out when your representatives and mine, or ours, get together.

Mr. SOFAER. I can say, and I am sure I speak for Mr. Richard, Senator, that there is no need for a letter. We agree right now to meet with the members of the committee staff, your staff, and to take up any question they wish to raise.

Senator HELMS. All right, then, I will say to my folks, you get in touch with their folks. OK.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Murkowski.

Senator MURKOWSKI. Perhaps, Senator Helms, that is why we have judges to interpret for us. One the other hand, sometimes that can get us in trouble, too.

Senator HELMS. Well, that depends on the judge, does it not? [Laughter.]

Senator MURKOWSKI. Just one last question, and I am sure this is something that would appear self-evident to some, but I am just curious as to both your answers—if they are the same, why then we only have to hear it once.

Why would a country like Libya want to be a signatory to this? What is the advantage? They are bad guys in our broad view.

Mr. SOFAER. Well, they want to take the position that they do not torture, and they want to be seen as adhering to that position, and that is probably good for the world, that even people we do not approve of. And some countries have become signatories and members, of this convention, parties to this convention where we believe torture is going on, and we believe that it is an advantage that they feel the moral compulsion to adhere.

We will certainly want to utilize the leverage of this convention to reveal the phoniness and the lies behind some of that.

Senator MURKOWSKI. Well, is this not kind of a hypocritical approach, though? Libya does not want to give us information or turn over to us someone they are torturing or what have you. They will simply ignore it. So do not some of them use this to achieve their own ends, but if it is something that is not in their best interest, they will just ignore it?

We have seen treaties before in the U.N. where countries have walked off and done their own thing. I just wonder why a country—and I pick out Libya at random—would find it advantageous when they are certainly circumspect in our minds.

Mr. RICHARD. If I may make an observation in that regard. If you take it the next step, let us assume that a country like Libya is a member, a party to the convention, and one of its officials is found in the United States. The we receive complains from abroad against that individual regarding alleged torture that he or she masterminded in Libya. Pursuant to the convention we would be in a legitimate position to ask Libya for evidence pertaining to those charges and, to the extent that it was not forthcoming, I think it would reflect on its commitment to abide by the principles of the convention.

So, I think, just to complement what Judge Sofaer has indicated, it is better for the process that they be a member of the convention than not, just in terms of its overall implementation.

Senator MURKOWSKI. I have no further questions.

The CHAIRMAN. Thank you very much.

Thank you very much, Judge Sofaer and Mr. Richard for being with us.

We now come to our public witnesses, who are Mr. Winston Nagan, Chairman of the Board of Directors of Amnesty International USA; Mr. David Forte, Professor of Law, Cleveland Marshal College of Law; Mr. James Silkenat, Chairman of the Section of International Law and Practice of the American Bar Association; Mr. Charles Rice, Professor of Law at Notre Dame; and Mr. David Weissbrodt, Briggs & Morgan Professor of Law at the University of Minnesota.

I would add that I have to leave here at 20 minutes to 12:00. So, I would hope that one of my colleagues would be willing to wrap up. If not, we will take the written statements. But I will still have to recess the committee at 11:40 a.m.

In view of the time constraints, I would hope each of you could digest your statements. Your statements will appear in full in the written record.

I would suggest that we start out with Mr. Winston Nagan, Chairman of the Board of Directors of Amnesty International USA.

Would you lead off?

STATEMENT OF WINSTON NAGAN, CHAIRMAN, BOARD OF DIRECTORS, AMNESTY INTERNATIONAL USA, GAINESVILLE, FLORIDA

Mr. NAGAN. Mr. Chairman, I will read an excerpt from my oral statement because of the time constraints, and would ask that the full statement be placed in the record.

Mr. Chairman, I am Winston Nagan, a Chairman of the Board of Directors of Amnesty International, USA. Amnesty commends you for holding these hearings. We appreciate the opportunity to testify in support of U.S. ratification of the Convention Against Torture.

Torture shocks the conscience of all humankind. It is repugnant to the American people. It is condemned as an affront to human dignity by our government, by the Congress, by the courts, and Presidents of the United States. The Convention Against Torture not only codifies international law with respect to torture, it also coincides with the conviction of the American people that torture has no place in a world that honors even the most limited conception of human decency and freedom.

Although there is near universal condemnation of torture, the practice of torture is widespread. Amnesty has documented the systematic use of torture in more than one-third of the countries of the world in the past decade, with additional instances of torture reported from many more countries.

I have with me a list of the major reports Amnesty has published in the last year with torture noted in the title, and I ask to submit this list into the record of these hearings.

Amnesty is uniquely positioned to stress the critical need for the ratification of the Convention Against Torture. We have kept up

the pressure to secure the abolition of torture since launching a major campaign for its eradication in 1972.

Amnesty published its report on "Torture in the Eighties" in 1984, the same year as the adoption of the convention now before us.

Between 1972 and 1989, we interceded on behalf of thousands of individuals who were in danger of being tortured in more than half of the countries of the world. We document the reality of torture. We look torture in the face.

We document the gouging out of childrens' eyes, the torture to death by molten rubber, the use of electric shocks. Always the reality is worse than anyone can imagine.

We know the problem in terms of individual human suffering, and we call upon individuals and governments to find solutions to this problem.

It is clearly in the United States national interest to be a party to this convention. It is a major purpose of government to seek and maintain the security and wellbeing of its citizens both at home and abroad.

Whatever the framework of legal protection of citizens inside the United States, it is readily apparent that the universal prohibition of torture enhances the protection that law can provide to American citizens everywhere.

In the long run, the protection of our citizens at home and abroad is better secured by respect for law.

It is widely known that the United States is the only permanent member of the U.N. Security Council not to have ratified the Convention Against Torture. It is simply inappropriate that the United States leadership role in the Security Council and the larger international system be encumbered by what could be perceived to be a lukewarm commitment to the universal eradication of torture.

Indeed, it is in the national interest that the United States not only lead but be seen to lead in the promotion of human rights and freedom.

The United states does have a credibility problem in the area of human rights covenants and conventions. The United States has played a leading role in the development of the major human rights treaties, but has declined to ratify many of them.

The U.S. role has been particularly conspicuous in the development of the Convention Against Torture. A failure to follow through with ratification would be unfortunate indeed.

Further serious credibility problems will arise if in the process of ratification, the United States undercuts the substance of the convention against torture through the attachment of limiting provisions. Moreover, it sets an unfortunate precedent for other nations whose record on torture is far less exemplary than that of the United States.

For these reasons we are pleased that officials of the Bush administration were willing to listen to the concerns of Amnesty International with regard to proposed reservations, declarations, and understandings.

We appreciate the priority the administration has given this convention and the flexibility it has shown on points of concern to us.

We have continued concern, however, with respect to certain limitations proposed by the Bush administration in the December 19, letter to you, Senator Pell. We have expressed our commendation to the Bush administration, as well as detailed our continuing concerns in a letter and memorandum dated January 26 to Secretary of State Baker. We ask that these documents be included in the record of these hearings.

We are particularly concerned that the United States has taken a reservation to article 16 of the convention, which would obligate the United States to prevent cruel, inhuman, and degrading treatment or punishment and educate and train law enforcement officials to that end.

We urge that this reservation to article 16 be withdrawn. It undermines the common understanding of the meaning of this - article and is indefinite in its content.

The committee against torture should be entrusted with the task of providing reasonable interpretations that will bind all states parties uniformly.

The reservation also undermines the ability of the U.S. Government to rely upon the treaty to criticize the offensive practices of other states parties who may seek to shield themselves by, justifications based on their own national laws.

Further, with reference to article 3, that is, the return or extradition of persons to a country where they may face torture, we regard the "more likely than not" standard that the Bush administration proposes as an unreasonably high burden of proof. We recommend the "well-founded fear" standard similar to that applied in the political asylum cases.

We note that the Bush administration does not recommend accepting the optional individual complaint procedures. Since the United States has, by comparative standards, an excellent record on torture, we believe that it has nothing to fear in granting its citizens this right.

We urge this committee and the Senate of the United States to consider the reality of torture and the need for practical tools to eradicate, this practice.

Ratification of the convention, as it is, will place the power and the prestige of our country squarely behind the international effort to prohibit and eradicate torture. Americans believe that their Government does, and ought to, lead the fight to end torture worldwide. They expect and want an expeditious response from the Senate in giving its advice and consent to ratification against torture.

Thank you, sir.

[The prepared statement of Mr. Nagan and addenda follow:]

PREPARED STATEMENT OF WINSTON NAGAN

Mr. Chairman, I am Winston Nagan, Chairman of the Board of Amnesty International USA. Amnesty International commends you for holding these hearings. We appreciate the opportunity to testify in support of U.S. ratification of the Convention Against Torture. We support U.S. participation in the established legal framework to eliminate torture.

INTRODUCTION

Torture shocks the conscience of all humankind. It is repugnant to the American people. It is condemned as an affront to human, dignity by our government, by the Congress in the Congressional Resolution Against Torture passed in 1984 (P.L. 98-447), by the courts of the United States and by Presidents of the United States. Former President Reagan described torture as "an abhorrent practice" when he called for ratification of the Convention Against Torture. President Bush earmarked the Convention Against Torture as a matter of "urgent priority" for his administration.

When we condemn torture and seek to establish a framework of international cooperation to end torture throughout the world, we place ourselves squarely and unequivocally on the side of the rule of law and repudiate the rule of violence and anarchy. We express the same profound concern that people of decency have expressed throughout the world.

The international rule of law in its most effective form not only protects the individual from the horrors of torture but is the cornerstone of freedom and democracy as we understand it in the United States. The Convention Against Torture not only codifies international law with respect to torture, it also coincides with the conviction of the American people that torture has no place in a world that honors even the most limited conception of human decency and human freedom.

The right to be free from torture is universally regarded as a fundamental human right. No state of emergency can give rise to an exception to this fundamental right. The world community has clearly indicated that torture is contrary to international law.

Although there is near universal condemnation of torture, the practice of torture is widespread. Amnesty International has documented the systematic use of torture in more than one third of the countries of the world in the past decade, with additional instances of torture reported from many more countries. I have with me a list of just the major reports Amnesty International has published in the last year, with torture noted in the title, and I ask to submit this list for the record of these hearings.

The United States joined the international community in its decision to develop a convention as a framework of international cooperation to end these practices, and spent seven years during the Reagan Administration negotiating with other governments the text of the Convention Against Torture as it was adopted by the General Assembly in December 1984. We come before you to urge U.S. ratification of that Convention as it was negotiated during that period.

THE PROBLEM OF TORTURE

Amnesty International is uniquely positioned to stress the critical need for ratification of the Convention Against Torture. We have kept up the pressure to secure the abolition of torture since launching a major campaign for its eradication of torture in 1972. In the early 1980's the Declaration Against Torture was promoted in the United Nations by a grassroots petition containing over one million signatures of ordinary men and women from all parts of the world.

Amnesty International published its report on "Torture in the Eighties" in 1984, the same year as the adoption of the Convention now before us. Between 1972 and 1989, we interceded on behalf of thousands of individuals who were in danger of being tortured in more than half of the countries of the world.

We document the reality of torture; we look torture in the face. We document the gouging out of children's eyes, the torture to death by molten rubber, the use of electric shocks. Always, the reality is worse than anyone can imagine. We know the problem in terms of individual suffering and call upon individuals and governments to find solutions to this problem.

One of the most pressing issues relating to torture from our experience is, as we stated in our reports, that "torture is usually part of the state-controlled machinery to suppress dissent. Concentrated in the torturer's electrode or syringe is the power and responsibility of the state." In our view, it is also the responsibility of states to address this reality among themselves. The Convention Against Torture is one way to do that and it merits the full support of the U.S. Government.

THE CHALLENGE TO THE SENATE

It is clearly in the U.S. national interest to be a party to this Convention. It is a major purpose of government to seek and maintain the security and well-being of its citizens both at home and abroad. Whatever the framework of legal protection of

citizens inside the United States, it is readily apparent that the universal prohibition of torture enhances the protection that law can provide to American citizens everywhere. The jurisdiction over torture envisioned in the Convention expands the rule of law at the expense of the rule of violence. In the long run, the protection of our citizens at home and abroad is better secured by respect for law.

It is widely known that the United States is the only permanent member of the U.N. Security Council not to have ratified the Convention Against Torture. It is simply inappropriate that the U.S.leadership role in the Security Council and the larger international system be encumbered by what could be perceived to be a lukewarm commitment to the universal eradication of torture. Indeed, it is in the national interest that the United States not only lead, but be seen to lead, in the promotion of human rights and freedom.

TOWARD A CREDIBLE RATIFICATION

The United States does have a credibility problem in the area of human rights covenants and conventions. The United States has played a leading role in the development of the major human rights treaties, but has declined to ratify many of them. The U.S. role was particularly conspicuous in the development of the Convention Against Torture. A failure to follow through with ratification would be unfortunate indeed.

Further serious credibility problems will arise if in the process of ratification, the United States undercuts the substance of the Convention Against Torture through the attachment of limiting reservations, understandings and declarations. Moreover, it sets an unfortunate precedent for other nations whose record on torture is far less exemplary than that of the United States.

For these reasons, we were pleased that officials of the Bush administration were willing to discuss the concerns of Amnesty International with regard to proposed reservations, declarations and understandings. We appreciate the priority the administration has given this Convention and the flexibility it has shown on points of concern to us.

We have continuing concern however with respect to certain of the reservations, understandings and declarations proposed by the Bush administration in the 19 December letter to you, Senator Pell. We have expressed our commendation to the Bush administration as well as detailed our continuing concerns in a letter and memorandum dated 26 January to Secretary of State Baker. We ask that these documents be included in the record of these hearings.

Amnesty International would prefer that the Convention be ratified as it was negotiated, giving the broadest possible reach to its effect in eradicating torture and other cruel, inhuman and degrading treatment or punishment.

We are particularly concerned that the United States has taken a reservation to article 16 of the Convention which would obligate the United States to prevent cruel, inhuman and degrading treatment or punishment and educate and train law enforcement officials to that end.

We urge that this reservation to article 16 be withdrawn for reasons cited on page 18 of our memorandum to Secretary Baker. It undermines the common understanding and is indefinite in its content. The Committee Against Torture should be entrusted with the task of providing reasonable interpretations which will bind all states parties uniformly. The reservation also undermines the ability of the U.S. Government to rely upon the treaty to criticize the offensive practices of other states parties who may seek to shield themselves by justifications based on their own national laws.

Further, with reference to article 3, that is, the return or extradition of persons to a country where they may face torture, we regard the "more likely than not" standard the Bush administration proposes as an unreasonably high burden of proof. That burden, of proving a greater than 50 percent probability of torture in an individual case, is a practical obstacle to article 3 being applied in most cases and is an unreasonable interpretation of the treaty language. We recommend the "well-founded fear" standard similar to that applied in political asylum cases.

We note that the Bush administration does not recommend accepting the optional individual complaint procedures (article 22). Since the United States has by comparative standards an excellent record on torture, it has nothing to fear in granting its citizens this right. As an organization committed to highlighting the cases of individuals, we regard this provision of the Convention as a significant one and encourage all governments to allow this right to their citizens.

CONCLUSION

We urge this Committee and the Senate of the United States to consider the reality of torture and the need for practical tools to eradicate this practice. As an organization focused to combat the practice of torture and to assist individual human beings who have suffered and who are threatened by the continued practice of torture, we want to state clearly and unequivocally that this Convention gives us one more tool to carry on that work.

More importantly, U.S. ratification of the Convention as it is will place the power and prestige of our country squarely behind the international effort to prohibit and eradicate this practice. Americans believe that their government does and ought to lead the fight to end torture worldwide. They expect and want an expeditious response from the Senate in giving its advice and consent to ratification of the Convention Against Torture.

LETTER FROM AMNESTY INTERNATIONAL USA

January 26, 1990.

The Hon. JAMES A. BAKER III,
Secretary of State, U.S. Department of State, Washington, DC.

Dear Secretary Baker: I have the honor to submit to you a document prepared by Amnesty International USA in support of the efforts of the Bush administration to secure the advice and consent of the U.S. Senate to the ratification of the Convention Against Torture and Cruel, Inhuman or Degrading Treatment of Punishment. This document will be presented with our testimony on the Convention in hearings before the Senate Foreign Relations Committee, and it is anticipated that it will become part of the record or these important proceedings.

As a non-governmental organization of ordinary people from all parts of the world, Amnesty International has been deeply involved in documenting the magnitude of the problem of torture on a worldwide basis, and working for practical solutions that might secure the eradication of the practice of torture as well as provide relief to individual victims of torture.

It is in this spirit that Amnesty International USA welcomed the signing of the convention on April 18, 1988. We saw this step as a positive signal by the United States to the American people and the world at large, that the United States takes seriously its role in the promotion and protection of human rights. Indeed, we have welcomed the role in the development of the Convention as an important aspect of the worldwide effort to eradicate torture and other human rights abuses enumerated in the Convention.

The adoption of the Convention by the United Nations on December 10, 1984, with the support of the United States, was a major step forward in the struggle to eliminate torture. Securing the Senate's advice and consent to ratification, and the achievement of ratification itself, will constitute further major advances in the work against torture. Appropriate ratification of the Convention by the United States will significantly augment the process of establishing effective, universal honored standards of conduct for all governments, and will contribute significantly to the enforcement of the international prohibition against torture in practice.I11U.S. adherence to the Convention Against Torture is of unquestioned importance. We commend the Bush administration for its review of the Convention and the transmittal of it to the Senate for its advice and consent. We are appreciative of the priority the administration has given this Convention and the flexibility it has shown on points of concern to Amnesty International.

Amnesty International would prefer the Convention to be ratified in the manner it was negotiated giving the broadest possible reach to its effect in eradicating torture. As a result we deem it appropriate to express our concerns about possible limitations on the interpretation or understanding of parts of the instrument. It is our hope and expectation that the ratification process ultimately will contribute to the broadest practicable framework for the legal eradication of torture and all other cruel, inhuman or degrading treatment or punishment.

Sincerely,

WINSTON P. NAGAN,
Chair, Amnesty International USA.

MEMORANDUM

On April 18, 1988, the United States signed the Convention Against Torture, Cruel, Inhuman or Degrading Treatment or punishment. On May 20, 1988, President Reagan submitted the Convention for the advice and consent of the Senate as to ratification with a May 10, 1988, Letter of Submittal of the Department of State. On December 19, 1989, Janet G. Mullins, Assistant Secretary of State for Legislative Affairs, sent a letter to Claiborne Pell, Chairman of the Senate Foreign Relations Committee suggesting the reservations, understandings and declarations that the Bush administration wishes to attach to the treaty at the time of ratification.[1]

This memorandum summarizes the essential substance of the Convention, provides a short history of the Convention, explains why Amnesty International advocates the ratification of the treaty, and analyzes the reservations, understandings and declarations which the letter of 19 December suggested.

1. The Substance of the Convention Against Torture

The Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment makes more specific and provides some mechanisms for assuring the implementation of the fundamental norm against torture in the Universal Declaration of Human Rights and in the International Covenant on Civil and political Rights: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

The Convention contains 33 articles. The following description gives the essence of each of these provisions, but specific questions must, of course, be resolved by reference to the language of each article. The treaty in article 1 defines torture as an "act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . ." Article 2 obligates ratifying states to "take effective legislative, administrative, judicial or other measures to prevent such actions of torture in any territory under its jurisdiction."

Article 3 obligates governments not to send, extradite or expel a person to a country where the person would be in danger of being tortured. Article 4 requires that torture be made a criminal offense with a severe penalty. Article 5 requires governments to establish criminal jurisdiction over criminal offenses involving torture when the offense was committed in the territory of the country or when the torturer or victim is a national of the country. Article 6 requires a government which finds a torturer in its territory to arrest the individual, determine whether it intends to prosecute the torturer and notify potentially interested states of its decision. Article 7 states that governments shall either extradite or submit the case to the competent authorities for the purpose of prosecution. Article 8 provides that torture shall be deemed to be included in any extradition treaty between states parties to the Convention and otherwise facilitates extradition. Article 9 indicates that governments shall assist each other in criminal proceedings against torturers.

Article 10 requires that governments ensure that law enforcement, medical and prison personnel shall be trained about the prohibition against torture and the prohibition should be included in their instructions. Article 11 provides that governments should keep instructions, methods and practices relating to arrest, interrogation and detention under review so as to prevent torture. Article 12 indicates that governments should undertake a prompt and impartial investigation wherever there is reasonable ground to believe that torture has been committed in its jurisdiction. Similarly, article 13 ensures that any individual has the right to complain that she has been subjected to torture and that the complainant as well as witnesses should be protected against intimidation as a consequence of the evidence they give.

Article 14 ensures that a victim of torture can obtain fair and adequate compensation, including rehabilitation. Article 15 requires that governments not use any

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[1] 14 M. Whiteman, Digest of International Law S7, at 137-38 (1970), provides basic definitions of the terms "reservation," "understanding," "declaration" and "statement":

The term "reservation" in treaty making, according to general international usage, means a formal declaration by a State, when signing, ratifying or adhering to a treaty, which modifies or limits the substantive effect of one or more of the treaty provisions as between the reserving State and other States party to the treaty.

The term "understanding" is often used to designate a statement when it is not intended to modify or limit any of the provisions of the treaty in its international operation but is intended merely to clarify or explain or to deal with some matter incidental to the operation of the treaty in a manner other than as a substantive reservation.

The term "declaration" and "statement" are used most often when it is considered essential or desirable to give notice of certain matters of policy or principle, without an intention of derogating from the substantive rights or obligations stipulated in the treaty.

statement elicited as a result of torture in any proceeding, except in a criminal prosecution for torture to prove that the statement was made. In article 16 governments undertake to prevent acts of cruel, inhuman or degrading treatment or punishment (not amounting to torture) which occur with the consent or acquiescence of a public official; article 16 also incorporates the provisions of articles 10 (police training), 11 (interrogation), 12 (investigation) and 13 (right to complain) with respect to ill-treatment not amounting to torture.

Article 17 creates a committee against Torture consisting of ten experts in the field of human rights who are elected by the states parties for terms of four years. Article 18 provides for the organization and servicing of the committee by the United Nations, but indicates that states parties are responsible for expenses related to the meetings of the states parties and the committee. Article 19 obligates states parties to submit a report to the committee about the measures they have taken to give effect to the Convention; the report should be submitted within one year after the Convention takes effect for each state party and every 4 years thereafter; the committee shall consider the reports, make "general comments," and may report the comments to the U.N. General Assembly.

Article 20 authorizes the committee against Torture to undertake a confidential inquiry *sua sponte* into "reliable information which appears * * * to contain well-founded indications that torture is being systematically practiced" in a country which has ratified the Convention; the confidential inquiry may-include a visit to the country concerned if the government agrees; the committee may include a summary account of the results of the inquiry in its annual report to the General Assembly. Article 21 establishes a procedure for states parties to agree to make and receive complaints against other states parties about violations of the treaty; the committee must deal with these complaints in closed sessions and make limited reports on the results. Article 22 establishes a procedure for states parties to agree that the committee against Torture can receive individual communications from persons who allege that they have been victim of a violation of the Convention; the committee is authorized by article 22 to examine such communications in closed meetings and to forward the committee's views to the State Party and the individual concerned.

Article 23 provides that members of the committee shall have the same privileges and immunities as experts of the United Nations on mission. Article 24 indicates that the committee shall make an annual report to the General Assembly.

Articles 25 and 26 provide that the Convention can be signed, acceded to or ratified by all states with appropriate notification to the Secretary General of the United Nations. Article 27 indicates that the Convention comes into force shortly after 20 governments have ratified or acceded to it. (The state-against-state complaint procedure in article 21 comes into force when 5 governments have accepted it. Similarly, the individual complaint procedure in article 22 requires the acceptance of five nations.) Article 28 permits governments to declare that they do not recognize the competence of the committee to undertake investigations pursuant to article 20.

Article 29 provides for amendment to the Convention if two-thirds of the states parties accept the amendment. If there is a dispute between two or more parties about the interpretation of the Convention, article 30 states that the parties may submit the matter to arbitration and if arbitration is not successful within 6 months, then any party may submit the dispute to the International Court of Justice. Article 31 permits governments to give notice of withdrawal (denunciation) from the Convention, but the withdrawal will not be effective until one year after the notice is given. Article 32 indicates that the U.N. Secretary General will notify states parties of signatures, ratifications, accessions, entry into force and denunciations. Article 33 makes the Convention equally authentic in all of the seven official languages of the United Nations.

2. Brief History of the Convention against Torture [2]

On December 10, 1984, the General Assembly of the United Nations adopted the Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or

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[2] This section of the memorandum is a severely edited version of Rodley, *The Evolution of the International Prohibition of Torture*, 5 AIUSA Legal Support Network Newsletter 1988; *see also* N. Rodley, *The Treatment of Prisoners in International Law* (1987); Boulesbaa, An Analysis of the 1984 Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 4 Dickinson J. Int'l L. 185 (1986); Hoffman & Brackins, *The Elimination of Torture: International and Domestic Developments*, 19 International Lawyer 1351 (1985).

Punishment (Convention against Torture).[3] The adoption of the Convention culminated, if not quite completed, a process of standard-setting initiated in the early 1970's. The instruments that have emerged from this process, in addition to the Convention, are the Declaration on the Protection of All Persons from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Declaration against Torture),[4] the Code of Conduct for Law Enforcement Officials [5] and the Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Principles of Medical Ethics).[6] The Body of Principles for the Protection of All Persons Under Any Form of Detention or I mprisonment was the last of these related instruments to be adopted by the General Assembly in December 1988.[7] This section will recapitulate the political process whereby the Declaration and the Convention were developed and adopted.

In November 1973 the General Assembly adopted resolution 3059 (XXVIII) in which it asserted its rejection of"any form of torture and other cruel, inhuman or degrading treatment or punishment." This resolution arose in part from the work of Amnesty International. In late 1972 Amnesty International had launched a yearlong campaign for the abolition of torture with the support of a broad range of nongovernmenal organizations (NGO's). Sweden, which introduced the draft [8] of what was to become Resolution 3059, specifically cited the then Chairman of Amnesty International's Executive committee, the former Irish Foreign Minister Sean McBride, to the effect that to "work actively for the complete eradication of every form of torture was a common humanitarian duty." [9] There was also worldwide dismay at the overthrow of the constitutional government of Chile by the Chilean armed forces in September 1973, accompanied by the death of President Salvador Allende, and by harrowing press reports of repression and brutality by the Chilean armed forces. In some ways, Chile provided a vivid illustration of the need to do something about the problem of torture.

Resolution 3059 was not exactly far-reaching, and it was clearly adopted with a certain reluctance: for example, the original Swedish draft envisaged that the Assembly would examine the question of torture as a separate item at its next session; the Assembly finally agreed only to examine the issue as an item of a future session.

Nevertheless, the issue reappeared at the next session of the General Assembly in 1974. Again, participants in the debate cited to NGO activities against torture as well as to NGO statements and activities in relation to the situation in Chile.

Resolution 3218 (XXIX) of November 6, 1974, emerged from the debate, launching the first stage of the standard-setting program. The General Assembly requested that the forthcoming Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders consider "rules for the protection of all persons subjected to any form of detention or imprisonment against torture and other cruel, inhuman or degrading treatment or punishment." [10] The Fifth Congress was also urged "to give urgent attention to the question of the development of an international code of ethics for police and related law enforcement agencies." [11] The Assembly went on to invite the World Health Organization (WHO) to draft "an outline of the principles of medical ethics which may be relevant to the protection of persons subjected to any form of detention or imprisonment against torture and other cruel, inhuman or degrading treatment or punishment." [12] This latter draft was to be brought to the attention of the Fifth Crime Congress.

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[3] Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force June 26, 1987, G.A. res. 46 (XXXIX), 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984) [hereinafter Convention Against Torture].

[4] Declaration against Torture, G.A.res. 3452 (XXX), 30 UN GAOR Supp. (No. 34) at 91, UN Doc. A/10034 (1975).

[5] Code of Conduct for Law Enforcement Officials, G.A. res. 169 (XXXIV), 34 UN GAOR Supp. (No. 46) at 185, UN Doc. A/34/46 (1979) [hereinafter Code of Conduct].

[6] Principles of Medical Ethics Relevant to the Role of Health personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 194 (XXXVII), 37 UN GAOR Supp. (No. 51) at 210, UN Doc. A/37/51 (1982) [hereinafter Principles of Medical Ethics].

[7] G.A. res. 43/173, 43 UN GAOR Supp. (No. —) (1989).

[8] See UN Doc. A/C.5/L.2010 (1973).

[9] 28 UN GAOR, Summary Records, Third committee at 95, UN Doc. A/C.3/SR.1988 at para. 1 (1973).

[10] GA res. 3218 (XXXIX), 29 UN GAOR Supp. (No.31) at 82, UN Doc. A/9631 (1974).

[11] *Id.*, para. 3.

[12] *Id.*, para. 5.

The Fifth UN Congress on the Prevention of Crime and the Treatment of Offenders took place in Geneva in August 1975. The Congress appeared to be a suitable body for dealing with the issue of torture for a number of reasons. First, the Congress had drafted the Standard Minimum Rules for the Treatment of Prisoners [13] at its first session. Second, the problem of torture is, indeed, one of criminality, albeit criminality sometimes committed by those charged with crime prevention, and the committee on Crime Prevention and Control had just categorized torture as a "major crime of transnational concern." [14] Third, the participants in the Congress come largely from the ranks of national administrations of justice. It might be expected that representatives with this background would want to affirm that torture is the antithesis of their calling.

On the first day of the Congress, the Swedish and Dutch delegations submitted a draft recommendation which set out the text of a draft declaration on the protection of all persons from being subjected to torture and other cruel, inhuman or degrading treatment or punishment,to be adopted by the General Assembly.[15] A working group of the Congress was set up to discuss the issue of torture. It concentrated on the Swedish/Dutch draft. The draft that emerged from the Congress was, with one minor amendment, adopted by the subsequent 30th General Assembly of the United Nations in Resolution 3452 (XXX) of 9 December 1975.

Article 2 of the Declaration states that: "any act of torture or other cruel, inhuman or degrading treatment or punishment is an offense to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights."

Furthermore, Article 3 states that "no State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment." The Declaration against Torture also contains various measures that States are expected to take to prevent torture. It was probably in view of the stringent and detailed obligations on governments contained in some of these measures that, during the Assembly discussions leading to the adoption of the Declaration, both the Netherlands and Sweden indicated that they did not consider the Declaration *per se* legally binding. Sweden, however, regarded the Declaration as a "suitable basis" for "an international convention" that it was "clearly necessary to envisage." [16] Two years later Sweden was to sponsor the initiative that led to the elaboration of the Convention against Torture.[17]

Meanwhile, in 1977, recalling that the Declaration against Torture was not of itself a legally binding instrument, Sweden introduced a draft resolution, according to which the General Assembly would have the UN Commission on Human Rights draft a convention against torture, based on the Declaration against Torture. Interestingly, this draft constituted the first resolution on the topic of torture to have the sponsorship of countries from all geographical regions (and thus all political regions) within the UN membership. The draft became Resolution 32/62 of December 8, 1977. Within the next 2 months the Commission on Human Rights met, at which time Sweden introduced the draft of the convention against torture and other cruel, inhuman or degrading treatment or punishment. The Commission worked on this draft from 1978 until 1984. In 1984 the Commission adopted a text leaving one or two controversial items unresolved. This text was forwarded to the General Assembly through the Economic and Social Council. In the same year the General Assembly adopted the final text of the Convention against Torture.

The Convention against Torture came into force on June 26, 1987, which marked the 30th day after the date of deposit of the 20th instrument of ratification or accession. There were 26 governments which had ratified or acceded to the treaty when the states parties met for the first time on 26 November 1987. The states parties elected the ten members of the committee against Torture. The ten members come from Argentina, Bulgaria, Cameroon, Canada, Denmark, France, Mexico, Philip-

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[13] Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, August 30, 1955, approved by the United Nations Economic and Social Council resolution 663 (C) (XXIV), 13 July 1957, amended by ESC res. 2076 (LXII), 13 May 1977.

[14] Report of the committee on Crime Prevention and Control, UN Doc. E/CN.5/516 and E/AC.57/21 rev. I, paras. 27, 39 (1974)

[15] *See* UN Doc. A/CONF.56 (1975).

[16] 30 UN GAOR, Summary Records, Third committee at 306, UN Doc. A/C.3/SR.2165, para. 56 (1975).

[17] G.A. res. 46 (XXXIX), *supra* note 2.

pines, Switzerland and USSR. During the week April 18-22. 1988 the committee met for the first time and adopted its rules of procedure.[18]

As of January 5, 1990, there were 50 states parties to the Convention; in addition 22 States have signed the Convention, including the United States.[19] As of the latest information, there were 23 governments which had accepted both the State against State procedure in article 21 of the Convention and the individual communication procedure of article 22 of the Convention.[20] Of the 50 states parties to the Convention, nine nations have opted out of the procedure for *sua sponte* investigation of torture as provided in article 20.

3. Why should the United States ratify the Convention against Torture?

In 1984 the U.S. Congress adopted a Joint Resolution regarding the implementation of the policy of the U.S. Government in opposition to the practice of torture by any foreign government and that resolution was signed by President Reagan. The Joint Resolution recognizes that torture is "absolutely prohibited by international legal standards." The Joint Resolution also directs the U.S. Government representative to the United Nations to involve the United States in the formulation of international standards and enforcement mechanisms, including the Convention against Torture, that are designed to abolish torture.[21]

It is important for the United States and other governments to adhere to international instruments which protect international human rights. It is especially important that the United States adhere to the international human rights instrument addressing the fundamental right to be free from torture. By ratifying the Convention against Torture, the U.S. Government will be affirming to the international community both its determination to respect the dignity and worth of human beings and its commitment to the reaffirmation of this principle by all countries. Ratifying this Convention and similar human rights treaties also assures the people of this country that, in the future, each national administration will be subject to a continuing international obligation to guarantee specific and fundamental rights. Ratification of the Convention and similar treaties constitutes an important indication of the commitment of the United States to the concept of human rights as a concern that transcends national boundaries.

There are a number of other reasons for U.S. ratification of the Convention against Torture:

(1) Since the United States has prominently urged the observance of human rights everywhere, the United States should join the growing number of countries which have ratified this very important' and quite fundamental treaty.

(2) The United States played an active role in the process of drafting the convention against Torture and should complete its, work by ratifying the treaty.

(3) United States credibility in promoting human rights will be tainted if it does not ratify the Convention (and other human rights treaties). If the United States is serious about its commitment to human rights it must ratify the Convention against Torture (and other human rights treaties) to demonstrate U.S. support for the international protection of persons subject to torture and to itself become subject to international scrutiny for its human rights record.

(4) The United States has very little to fear from ratification because the U.S. record, albeit not unblemished, is relatively good on torture and ill-treatment. Where the United States has a problem, it should welcome international encouragement to improve this situation, as a way of demonstrating this nation's impartial concern for human rights everywhere.

(5) If the United States fails to ratify the Convention, it will be ineligible to have a U.S. citizen sit on the committee against Torture and will be unable to participate further in the international effort to assure that torture is not practiced. Since the procedures for implementing the Convention are just being developed, now is a critical time for the United States to begin participating actively in the committee against Torture.

4. Amnesty International USA's Position on the Proposed Reservations, Understandings and Declarations

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[18] UN Doc. CAT/C/1, at 1 (1988).

[19] UN Doc. CAT/C/2/Add.1, at 1-3 (1989), updated by later information.

[20] Argentina, Austria, Denmark, Ecuador, Finland, France, Greece, Luxemburg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Togo, Tunisia, Turkey, Uruguay and eight others. .The United Kingdom is one of those who has made a declaration that it would receive only State against State complaints.

[21] Hoffman & Brackins, supra note 2, at 1351, 1358.

Amnesty International USA favors the acceptance of the Convention against Torture without reservations, understandings or declarations except those called for in Articles 21 and 22 of the Convention. None of the reservations and understandings proposed in the State Department's letter of December 19, 1989, are required by the Constitution of the United States. The Convention represents an international minimum standard of conduct and therefore a government which wishes to ratify the Convention should be extremely reluctant to assert that it may be unwilling to abide by this minimum standard.

No government has asserted such an extensive list of reservations, understandings and declarations as that proposed by the State Department's letter of December 19, 1989. Indeed, there have been relatively few reservations and understandings with respect to the Convention. Chile has interposed three reservations and two declarations in regard to its ratification of the treaty. (This has generated 16 objections to their reservations from other states parties.) Austria has asserted two very brief and limited understandings. Fourteen governments (including Chile) have asserted a reservation to article 30 in regard to the jurisdiction of the International Court of Justice, but three nations (including the USSR) have withdrawn their reservations in this regard. In addition to its declaration as to article 30, the German Democratic Republic has declared that it will bear its share only of expenses in accordance with articles 17 and 18, but implied not articles 20 (sua sponte inquiries), 21 (State v. State) and 22 (individual communications). A large number of governments have objected to the declaration of the German Democratic Republic as to expenses under the Convention. Ecuador and New Zealand have asserted one reservation; Netherlands has stated one understanding; and Luxembourg has made one declaration.

The Bush administration letter of December 19, proposes 3 reservations, 7 understandings, and 2 declarations. The purpose of most of these reservations, understandings, and declarations is to assure that the Convention will have little or no impact in the United States, because U.S. law is regularly asserted as the source of reservations or interpretations of the treaty. Such a posture will not enhance U.S. credibility regarding its commitment to promoting human rights throughout the world. It would be far better if the United States ratifies the Convention with fewer or no reservations, understandings, or declarations, except those declarations called for under Articles 21 and 22.

Amnesty International supports the ratification of the Convention against Torture without reservations. The remainder of the letter sets forth the views of Amnesty International USA as to the reservations, understandings and declarations discussed in the State Department's letter of December 19, 1989. Amnesty International appreciated the willingness that the administration has exhibited to discuss the proposed reservations, understandings and declarations so that U.S. ratification can be achieved at the earliest possible time.

a. Proposed Declaration on the Self-Executing Nature of the Convention

The State Department's letter proposes the following declaration: "The United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing."[22]

The Supremacy Clause of the United States Constitution has been interpreted by the Supreme Court to assure that treaties are not only the supreme law of the land, but also may at least in some circumstances be considered law applicable by the courts without implementing legislation. Accordingly, some treaty provisions are considered to have direct domestic consequences, that is, the treaty clauses are considered "self-executing." Other treaty provisions require legislative action to carry them into effect, that is, they are considered "not self-executing."

Whether a treaty is self-executing or not self-executing is initially a question for the Executive which must decide whether to "take care" that the treaty is "faithfully executed" as law.[23] While the views of the Executive will be given great weight, ultimately the issue has been considered one for the courts which must determine whether to give the treaty effect as law without legislative implementation. Domestic courts have considered the distinction between self-executing and not self-executing treaties as a matter of interpretation to determine whether the treaty language was intended to have direct impact. For example, article 3 of the Convention is stated in such clearly obligatory language that it may well be self-executing: "No

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[22] Letter from Assistant Secretary of State Janet G. Mullins to Chairman Claiborne Pell, December 19, 1989; *see also* Letter from Secretary of State George Shultz to President Reagan (May 10, 1988), Message from the President of the United States transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 100th Cong., 2d Sess. v, 2 (1988).

[23] U.S. Const. art. 11, sec. 3.

State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

By way of contrast article 11 is rather vague and requires legislative and administrative activity which would not easily be enforced by direct judicial action: "Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture."

This declaration attempts both to limit the direct internal effect of the Convention and to take this difficult issue out of the hands of the courts. The letter would substantially diminish the impact of the Convention in the United States by asserting a declaration that the Convention is not self-executing. Amnesty International USA opposes in principle any effort to deprive U.S. courts of a vital tool that might contribute significantly to an effective interpretation of the Convention Against Torture. We also oppose any effort to deprive the U.S. courts of the capacity to make the Convention a real bulwark against torture.

THE PROPOSED FEDERAL-STATE RESERVATION

The State Department's letter of December 19, 1989, proposes the following reservation: "The United States shall implement the Convention to the extent that the Federal Government exercises legislative and judicial jurisdiction over the matters covered therein; to the extent that constituent units exercise jurisdiction over such matters, the Federal Government shall take appropriate measures, to the end that the competent authorities of the constituent units may take appropriate measures for the fulfillment of this Convention."

This reservation might be contrasted with the basic

provision of the Convention against Torture in article 2, which guarantees that each "State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture *in any territory under its jurisdiction.*" (emphasis added.)

The United States has been involved in the drafting of international human rights conventions which contain "federal clauses" that make provision for the differing capacity of various units within federal states to implement such treaties. *See, e.g.*, American Convention on Human Rights, art. 28. There is no such clause in the Convention against Torture. Indeed, article 2 and the other provisions of the Convention assume that the United States will assure the implementation of the treaty against torture.

The Federal Government has the power under the U.S. Constitution to enter into binding treaties in the areas covered by the Convention.[24] Only if the treaty had directly contradicted a specific prohibition of the U.S. Constitution might there have been some question about the need for a reservation.[25] No such reservation is needed in this case. The need for a Federal-State reservation is questionable in light of the fact that acts of torture are interpreted as federal crimes under 18 U.S C.A. 242.[26] The United States has similarly provided for civil liability or injunction where individuals are deprived under color of law of their rights under the Constitution or the laws of the United States.[27]

The State Department in its May 10, 1988, letter of submittal gives a far more benign explanation, that is, "This reservation would relate primarily to the obligations contained in Articles 10–14 and 16 of the Convention relating to training of law enforcement personnel, review of law enforcement procedures, investigation of allegations of torture and complaints and civil suits alleging torture. It would not exclude state or local officials from the prohibitions on torture contained in the Convention."

If taken at face value this explanation substantially assuages any doubts one might have concerning the proposed Federal-State reservation. It might, however, be appropriate for the reservation to be attached specifically to articles 10–14 and 16—rather than to the whole Convention. Indeed, the word "primarily" in the ex-

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[24] *Missouri* v. *Holland*, 252 U.S. 416, 432-34 (1920).

[25] *Id.*, at 434.

[26] 18 U.S C.A. sec. 242 makes it a criminal offense for anyone under color of law to subject any inhabitants of a state to deprivation of rights, privileges or immunities secured by the Constitution and-laws of the United States. In Williams v. United States, 341 U.S. 97, 100 (1951) a private detective acting under color of law was convicted under sec. 242 because he whipped the victim with a rubber hose and repeatedly hit the victim in the stomach to elicit a confession.

[27] 42 U.S. C.A.S. 1983.

planation quoted above could support the argument that the reservation applies to everything in the Convention. Hence, Amnesty International USA suggests that the reservation be narrowed along the lines of the State Department's explanation to apply only to articles 10–14 and 16.

c. The Proposed Understanding to the Definition of Torture in Article 1

Article 1 of the Convention against Torture defines torture as follows:

"1. For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

"2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."

The State Department's letter of 19 December 1989 proposes an understanding which would clarify the definition, particularly as to psychological torture:

"The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to the prolonged mental harm caused by or resulting from (I) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personaity; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

The letter goes on to add an additional four understandings to article 1:

"The United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control."

"The United States understands that 'sanctions' includes not only judicially-imposed sanctions but also other enforcement actions authorized by United States law or by judicial interpretation of such law provided that such sanctions or actions are not clearly prohibited under international law."

"The United States understands that the term 'acquiescence' requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity." (An explanatory note in the December 19, 1989 letter notes that "knowledge" has been changed to "awareness" "to make it clearer that both actual knowledge and willful blindness fall within the meaning of 'acquiescence.' ")

"The United States understands that noncompliance with applicable legal procedural standards does not *per se* constitute torture."

Amnesty International USA supports the view that the internationally negotiated definition of torture in article 1 of the Convention should be accepted as such by the United States. Although the effort to achieve greater clarity through elaborate understandings may be understandable, the better course appears to us to be to allow the committee Against Torture to exercise its role in the process of interpretation of the Convention rather than have individual states parties attempt to redefine torture through numerous understandings. We assume the role of the committee, whose competence the United States has commendably recognized, will be to interpret the meaning of the Convention and provide a uniform standard to which all states parties will be held.

d. Proposed Understanding to Article 3

Article 3 provides: "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

The State Department's letter proposes an understanding that the phrase "substantial grounds" means "more likely than not." The "more likely than not" standard of proof derives from the U.S. Supreme Court decision in *INS* v. *Stevic,* 467 U.S. 407 (1984), interpreting U.S. immigration laws relating to the deportation of individuals "whose lives or freedom would be threatened" on grounds of race, religion, etc., if they are deported.

Amnesty International objects to this understanding which would place unwarranted limits upon our obligation not to return persons to countries where there are substantial grounds to believe the person would be in danger of being subjected to torture. The proposed, "more likely than not" standard is not a reasonable interpretation of the treaty language. The Convention speaks of "substantial grounds" to believe one would be "in danger" of being "subjected to torture," not of proof that the person actually will be tortured. The treaty is concerned with possibilities, not probabilities. Substantial grounds would certainly exist in a case where a person faced a 45 percent (or even a 30 percent) chance of being tortured on his return, yet the proposed understanding would exclude that person from the treaty's protection unjustifiably.

The proposed understanding draws an unconvincing parallel with a very different provision on withholding of deportation (243(h) of the Immigration and Nationality Act). That provision and the treaty provision upon which it is based (article 33 of the Refugee Convention) extend protection to a person whose "life or freedom would be threatened" (emphasis added), language very different from that of the Convention against Torture, article 3. The "substantial grounds" language of the Convention against Torture is much closer to the "well-founded fear" standard governing political asylum (208 of the Immigration and Nationality Act). Moreover, given the nature of the risk involved under article 3 (torture rather than simply detention) the higher burden of proof required under 243(h) is not suitable.

e. Proposed Understanding to Article 14

Article 14 provides: "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation. . . ."

The understanding proposed is: "that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party."

The May 10 letter of submittal states that article 14 does not provide universal jurisdiction for a private right of action for victims of torture. The State Department recognizes that "some U.S. courts have held that current U.S. law provides a private right of action for acts of torture occurring outside the United States." The letter continues: "this result is not compelled by the Convention." [28] The State Department's comment is an unnecessary and probably incorrect jab at the *Filartiga* decision, but it is merely a comment and not a reservation or understanding. The comment should, nevertheless, be withdrawn because of its mischievous effect on 28 U.S.C. 1350 and the *Filartiga* decision.

876, 889 (2d Cir. 1980), which held that a U.S. federal court had jurisdiction to consider a claim that a Paraguayan national had been tortured to death by a Paraguayan police official. The second circuit opinion in *Filartlga* did not rely on the Convention Against Torture.

Article 14 does not restrict a State's unilateral decision to adopt universal jurisdiction. Additionally, article 14(2) explicitly provides that nothing in this article will mitigate any right a victim may have under a State's national law.

f. Proposed Reservation to Article 16

Article 16 imposes an obligation upon a State Party to: "undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture . . ."

The proposed reservation states: "The United States considers itself bound by the obligation under Article 16 to prevent cruel, inhuman or degrading treatment or punishment only insofar as the term cruel, inhuman or degrading treatment or punishment means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."

Amnesty International USA strongly urges the administration to withdraw this reservation. The Convention like all treaties, is intended to express a common understanding among the states parties. While reservations that limit a state's obligation in some nonfundamental and precise manner may arguably be permissible, this reservation is objectionable for two major reasons: (1) it undermines the common understanding by limiting the U.S. obligation to that already compelled by domestic law, implicitly inviting a like response from other States and thus undermining the

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[28] The May 10, 1988 letter cites *Filartiga* v. *Pena-Irala*, 630 F.2d

treaty; and (2) it is indefinite in content, in that the U.S. obligation under article 16 will vary as domestic interpretations of the cited Constitutional provisions change.

The committee against torture, a body elected by the states parties, should be entrusted with the task of providing reasonable interpretations of article 16 which will bind all the states parties equally.

Reservations such as that proposed also undermine the ability of the U.S. Government to rely upon the treaty to criticize the offensive practices of other states parties, who may seek to shield themselves by justifications based on their own national laws.

It should be noted that the most powerful sanctions of the Convention do not apply to acts of cruel, inhuman or degrading treatment or punishment. For example the Convention does not attach criminal sanctions or mandate the extradition or trial of those persons engaged in cruel, inhuman or degrading treatment or punishment. The Convention obligates states parties only to undertake measures to prevent these other acts of ill-treatment. Preventive measures include the training of law enforcement agents to omit cruel, inhuman and degrading treatment. These obligations are not onerous. The United States should adopt article 16 as written, show its willingness to conform its conduct to international standards and indicate by doing so that it has nothing to' fear from the application of international human rights standards.

g. Articles 21 and 22

Article 21 allows a State Party to recognize the competence of the committee to receive and consider claims that another State Party is not fulfilling its obligations under the treaty. Article 22 allows a State Party to recognize the competence of the committee to receive communications from individuals subject to the State Party's jurisdiction.

The Bush administration recommends accepting the jurisdiction of the committee against Torture to deal with State v. State complaints under article 21. We welcome that action by the administration. The U.S. support for the committee enhances the ability of the committee to develop a uniform standard with universal applicability. It is also to be welcomed that the United States may now be an active participant in the articulation and development of these standards.

Amnesty International USA does regret that a similar declaration was not made with respect to individual communications under article 22. Such a narrow view of the Convention will not afford U.S. citizens the sort of protection from torture which they deserve. As an organization committed to highlighting the cases of individuals, be they Prisoners of Conscience and/or victims of torture, we regard this provision in the Convention as a significant one and encourage all governments to allow this right to their citizens.

h. Proposed Reservation to Article 30

Article 30 provides in 30(1) that in State v. State disputes, where the parties cannot agree on an arbitrator, either Party may refer the dispute to the International Court of Justice. Article 30(2) allows any state to declare that it does not consider itself bound by article 30(1).

The State Department has proposed that the United States make the reservation that it does not consider itself bound by article 30(1). The State Department supports this reservation because it complies with prior U.S. policy decisions. In October 1985, the United States withdrew its acceptance of the compulsory jurisdiction of the court pursuant to Article 36 of the Statute of the International Court of Justice. Therefore, the decision not to recognize the International Court in this matter is represented as being in the same vein. Rather than making a decision consistent with the 1985 withdrawal, however, the United States is diminishing its recognition of the International Court. The acceptance of the court's compulsory jurisdiction comes under Article 36(2) of the statute of the court, whereas the court's jurisdiction over matters referred to it or provided for in treaties is quite separate and comes under Article 36(1).

The United States has, in the past, shown an interest in bringing cases to the International Court of Justice when the specific treaties call for the Court to have jurisdiction. Such cases have occurred in the context of bilateral treaties where the treaty provides for jurisdiction before the International Court of Justice.[29] With the

[29] The United States has sought jurisdiction before the International Court of Justice based upon specific treaty provisions several times in the past decade, including *Case Concerning*

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present proposed reservation by the State Department the United States is withdrawing further from its acceptance of the International Court of Justice. The reservation is a retreat by the United States from the International Court of Justice and the peaceful resolution of disputes in the international community.

We note that the U.S.S.R. has announced it will withdraw its reservation to Article 30. With the significant political changes occurring in Eastern Europe at this time, it is hoped that other states parties making this reservation will also withdraw it. We recommend this course of action to the United States as well.

In conclusion, Amnesty International USA requests the administration to reconsider the reservations and understandings found in the State Department's letter of December 19, 1989, in light of the concerns we have raised in this memorandum and respond positively to any Senate action to address these concerns. We look forward to continued discussions with the Bush administration and to working together toward speedy ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment.

The CHAIRMAN., Thank you very much, indeed, Mr. Nagan.

We now come to Mr. David Forte, Professor of Law at the Cleveland Marshal College of Law at Cleveland State University.

STATEMENT OF DAVID FORTE, PROFESSOR OF LAW, CLEVELAND MARSHAL COLLEGE OF LAW, CLEVELAND STATE UNIVERSITY, CLEVELAND, OH

Mr. FORTE. Thank you, Mr. Chairman. It is nice to see you again.

The CHAIRMAN. Thank you.

Mr. FORTE. I shall submit my full statement for the record and get to the nub of the issue right now.

From the testimony we have received, we are now seeming to come to a consensus that a number of reservations are necessary to make this convention effective, both in terms of U.S. laws and concerning with human rights internationally. The only questions are which ones and how they should be refined.

I have been doing significant research in the "travaux preparatoires"—that's French for "committee hearings"—of the negotiations leading to the treaty. The treaty itself fully expected that there would be reservations.

It is a multilateral treaty. Multilateral treaties, by their nature, cannot cover every type of nuance in every legal system. So, very often, multilateral treaties expect reservations.

Let me give you some examples.

On the definition of "torture," according to the commentary of two of the prime negotiators of the treaty, the representatives of Holland and Sweden, the definition of torture in article 1 was not designed to be a penal definition. I repeat: it was not designed to be a definition that was to be transported, as a whole, into criminal law.

United States Diplomatic and Consular Staff in Teheran, 1980 I.C.J. 3, 4, where the United States asserted jurisdiction based upon provisions in the Treaty of Amity, Economic Relations and Consular Rights of 1955. The International Court of Justice also based jurisdiction upon the Optional Protocols to Vienna Convention of 1961 and 1963 on Diplomatic and Consular Relations. In *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area*, 1984 I.C.J. 246, 249, jurisdiction was provided by the Special Agreement dated March 29, 1979, between the United States and Canada. On February 6, 1987, the United States filed in the Registry of the International Court of Justice an application instituting proceedings against Italy. The jurisdiction in the case, *Elettronica Sicula S.p.A. (United States of America v. Italy)*, is based upon Article XXVI of the Treaty of Friendship, Commerce and Navigation signed February 2, 1948, between Italy and the United States. International Court of Justice Communique, No. 87/2, February 9, 1987.

The negotiators to the convention and the drafters of article 1 said that explicitly.

What article 1 was designed to do was elucidate the notion of torture which had been condemned previously in many other treaties and declarations but had never had any flesh put upon it.

So it is left to the nation states, in their penal legislation or through reservations, whichever is more appropriate, to find a definition of torture that is explicitly focused on what the criminal aspects of that act should be.

Second, on the jurisdiction of the International Court of Justice, it is explicit in the convention that a reservation is permitted. We should note that at any time, once the convention is ratified, we can later on accept the jurisdiction of the International Court of Justice. But once we accept the International Court of Justice jurisdiction and if bad things come from that, the only way we can get out of it under the treaty would be to denounce the treaty altogether, and that would be unfortunate.

Third, Senator Helms mentioned the question as to why the extradition exception was not kept in the latest rendition by the Justice Department and the Department of State.

In fact, a number of states had made a statement on the record that they would like to have article 3 not apply to existing extradition treaty standards. And, in the commentary to the treaty, it was expected. That was the word. It was "expected" that a number of states would opt for such a reservation should they find it necessary.

Why do we need so many reservations?

We need so many reservations because the U.S. Government is a Government of very complex structure: our Federal structure, and our highly developed notions of due process.

Mr. Chairman, we should never forget that, as noble as convention is—and I do hope we ratify it in far less time than 35 years—as noble as this convention is, in my view, the greatest human rights document extant in the world today is the United States Constitution.

Anytime a document that is extrinsic to the legislative process of this country can have effect within the country and be applied by the judiciary without sufficient legislative guidance, there is a danger that our tradition of due process can be undermined.

For example, in one of the reservations, dealing with the definitions of intent, the word "awareness" was used by the State Department, rather than "knowledge." Well, it strikes me that that goes against our normal requirement in criminal law that there must be specific intent before we can punish somebody.

I think "awareness" is too weak a term. I think "knowledge" or "actual knowledge" would be a far better term.

In conclusion, I would like to bring up one final point, and that is the difference between the Reagan submission and the Bush submission regarding articles 20, 21, and 22.

We are under a dilemma in this kind of treaty because there are ten states, among whom are Bulgaria, Mexico, and the Soviet Union, that have accepted the jurisdiction of the committee against torture to receive individual and state party complaints as to their

torture practices, and also the complaints of others about state party practices in regard to torture.

May I have time to conclude? I should be only a moment.

The CHAIRMAN. Yes.

Mr. FORTE. Many international agencies, such as UNESCO, have, unfortunately, been perverted into political actions against the United States in the past. We want very much for this committee against torture not to turn into that situation.

I would suggest, therefore, that the Senate consider one of two alternatives: first, the Reagan alternative of waiting a few years to make sure that this committee of experts properly fulfills its duty and investigates torture without political bias; or, second, if the committee decides to accept the current administration's view that we should accede to the committee against torture's jurisdiction, we should get binding and reliable assurances from the administration that for political reasons, we will not hesitate to bring up actions of torture against China, we will not hesitate to bring up actions of torture against Mexico or the Soviet Union.

I think if either of those two things are done, then we can safely move into the treaty. But I do not think we should allow ourselves to be hit by charges from foreign governments about torture when we do not have the political will to make the counter arguments against them.

Thank you.

[The prepared statement of Mr. Forte follows:]

PREPARED STATEMENT OF DAVID F. FORTE

Today is a day for hope and caution. The consideration by the United States Senate of the Convention Against Torture can be another major step towards the realization of America's vision of a world order ruled by law, in freedom, and with a concern for the dignity of every human person. Every person in this room who has dedicated his or her mind, energy, prayers, and public service to the cause of freedom and justice for years or decades cannot but be deeply moved by the events of the past two years. We can recall the prophecy of the Sermon on the Mount: "Blessed are they hunger and thirst for justice, for they shall be satisfied."

Like the other victories for human rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment can be beneficial only if we take it seriously and we take our participation in it seriously. We should accede to the Convention not because it sounds or looks good, but only if it furthers the American interest in protecting freedom and security both within this country and overseas.

We should remember that, even in its present form, the Convention Against Torture was not obtained easily within the international atmosphere of the United Nations. Administrations from both parties, both the Congress and the Executive, have long known what a hostile diplomatic environment the United Nations has been for the interests of the United States. Ten years ago, the Executive and Congress made the firm decision that to take the United Nations seriously. We decided that the United States would no longer supinely accept insults to this country or to the cause of human rights. It has been a valiant struggle within an institution unready for change because of its institutional structure and rigid agenda. But changes nonetheless were won.

Over a period of eight years under the vigorous leadership of Ambassadors Jeane Kirkpatrick and Vernon Walters, significant progress was made on the issues of Afghanistan, Cambodia, chemical warfare, African famine and economic development, terrorism, and human rights. Ambassador Richard Shifter in particular deserves the gratitude of our country for his work in bringing the Convention Against Torture to reality. I hope the United States does not now lessen its pressure on the United Nations to reform its structure and modify its agenda.

In considering this Convention, we should assure ourselves that it will work for its intended purposes, and not be perverted for political objectives the way some

other international agencies, such as UNESCO, have been. I believe that this Convention can further the cause of human rights, provided certain reservations, understandings, and assurances are present. At a minimum, the revised package of reservations and understandings submitted by the Department of State is absolutely necessary for the success of the Convention Against Torture, although a few, in my opinion, need modification. However, the Senate should also obtain additional assurances that the administration intends to take the Convention in earnest and neither withhold for our own political reasons evidence of torture committed by other states, nor accept the mechanism of the Convention being turned against the United States by states unfriendly to our values.

There are two essential reasons why a group of reservations is necessary to the success of the Convention. First, in bilateral treaties, the two parties are normally aware of the specific institutional and foreign policy needs of each other. Details respecting the particular requirements of each party can be negotiated into the text. Of course, in the American context, the role of the Senate in the approval of treaties allows for an additional voice. But by and large, a wise administration shall take into consideration the opinions of the Senate during the negotiation phase. Reservations are often, therefore, less critical to the success of bilateral treaties.

Multilateral treaties, on the other hand, deal with any number of parties, each of which has differing internal political, economic, and legal institutions. It is frequently impossible for a multilateral treaty to contend with and incorporate the range of variations that the respective parties bring to the table. Consequently, most multilateral treaties contemplate the possibility and the expectation of reservations and it is perfectly appropriate for there to be any number of reservations.

The Vienna Convention on Treaties permits reservations to treaties, unless "the reservation is incompatible with the object and purpose of the treaty." (Art. 19 c) The Convention Against Torture contemplates that there will be reservations. Not only are appropriate reservations compatible with the object and purpose of the Convention, they will assist in making the United States participation in the Convention more effective.

Second, as important and noble as the Convention Against Torture may be, we must never lose sight of the fact that the greatest human rights document in the world today is the United States Constitution. Any Convention which modifies the structure of our political process, or which changes our laws without reference to our constitutional values does the cause of human rights no service. The reason why these reservations are important is because the United States takes the rule of law to heart, and the members of the executive, judicial, and legislative branches only serve in their respective positions of power upon taking an oath to preserve, protect and defend the Constitution of the United States.

Although some groups have criticized the administration for putting forwards reservations that seek to maintain American legal standards, this is precisely why these reservations are necessary. The American system of justice, of due process, and of human rights has no peer in the world. When other countries adopt the protections we have for the criminally accused, for the political opposition, and for the religious dissenter, then they may appropriately criticize us. But the United States owes no apology for its Constitution. To bring into harmony the application of the Convention Against Torture with American law does both a service. When Prime Minister Nehru was questioned shortly after Indian independence why he chose to stay in the British Commonwealth, he replied that the Commonwealth was not independence with something less. Rather membership in the Commonwealth constituted independence with something more. Similarly, reservations that maintain the coherence of the American constitutional order will give us the benefits of the Convention Against Torture with something more, much more.

In particular, it is vital that the United States declare that the Convention be not self-executing, that the definition of inhuman punishment under Article 16 comport with the Eighth Amendment to the United States Constitution, and that the United States not agree to the compulsory jurisdiction of the International Court of Justice at this time.

There is, in addition, one omission in the latest package put forward by the Department of State that deserves special comment. In 1988, the administration had decided not to recognize the competency of the Committee Against Torture under Articles 20, 21, and 22. The current position of the State Department is that the United States should adhere to those articles. In 1988, the administration wished to defer recognition of the competency of the Committee Against Torture until we had some time to assess the manner in which it carried out its work. It was a prudent caution. There are many international organizations and entities supposedly dedicated to the cause of human betterment that have been undermined by corruption

and political biases. UNESCO is one that comes immediately to mind. We should be cautious in allowing a new organization to be used as a possible political weapon against the United States until we have seen how it actually operates.

It is, therefore, important to note what other states have adhered to the competency of the Committee Against Torture. At present, ten states have agreed to the committee's jurisdiction. They include Bulgaria, Mexico, and the Soviet Union. This leaves the United States in a dilemma. On the one hand, it has been countries like Bulgaria, the Soviet Union, and Mexico that have politicized U.N. agencies against the United States in the past. I can say frankly from my experience at the United Nations that Mexico is no friend of this country in that forum. On the other hand, it is precisely those countries, and others, we would want to have investigated for alleged violations of human rights.

To resolve this dilemma, we should opt for one of two practical alternatives. First, inasmuch as we still do not know if this Committee will be undermined by political considerations in the way that supposedly nonpolitical organizations like UNESCO have been, we could choose to follow the example of the majority of other countries that have ratified the Convention. We can withhold our recognition of the jurisdiction of the Committee Against Torture until we can measure how fairly and impartially it accomplishes its mandate.

On the other hand, if the Senate should choose to go along with the latest position of the Department of State and accept the jurisdiction of the Committee Against Torture, the Senate should first obtain some firm, formal and reliable assurances from the Department of State.

First, will the United States in fact forward evidence of torture to the Committee Against Torture that may occur in countries such as Mexico and the Soviet Union without regard to political considerations? After all, the Convention is designed to protect human individuals from one of the most heinous acts that governments can commit. We should not blithely let these pass simply because of diplomatic considerations. Second, can we expect that at the next election for members of the committee it is probable that a United States national will be appointed to the committee? Third, if the Committee Against Torture does become distorted by anti-American political biases, what assurance do we have that the United States will exercise its rights under Articles 21 and 22 and promptly withdraw? Finally, can we have any reasonable assurance in the light of recent events that the administration will use its diplomatic influence which it claims it is maintaining with the Peoples' Republic of China to have that government also accept the competency of the committee? Are we now pressing China to live up to its obligations under the Convention?

I do not believe the Senate would be wise in allowing the United States to be subject to charges brought before the committee until it has some definite assurance that the administration will not, for politically expeditious reasons, fail to bring egregious offenses to the attention of the committee. I suggest to you, gentlemen and gentlelady, that some assurance from the current administration should be obtained that incidents of torture in Mexico or in China, for example, will not be ignored if the Senate agrees to accepting the jurisdiction of the committee. Frankly, as it now stands, if political reasons restrain the administration from doing much on these vital human rights issues now, the fact that we agree to the competency of the committee will not change that attitude. But if the Senate makes it a quid pro quo, if it agrees to adhering to Articles 21 and 22 on condition that the administration will bring specific violations before the committee, and gives the Senate the other vital assurances I have suggested, then it may be appropriate to accept the committee's jurisdiction. Otherwise, the wisest course would be to abstain from the committee's jurisdiction until the Senate can evaluate the conduct of the committee and the manner in which other parties to the Convention abide by its obligations.

At this point, I would like to offer the Foreign Relations Committee some comments on specific reservations as submitted by the Department of State in December 1989.

1. General Reservation. This reservation respects the federal nature of the American polity. It keeps intact the delicate balance between state and federal authority that the framers of the Constitution so astutely provided for tin the Great Compromise of 1787. It assures that the workings of our federal system may not be used by other parties to this Convention to declare that the United States is not in compliance. It therefore keeps our international obligations and our constitutional requirements in harmony.

2. Reservation to Article 16. By making the prohibitions in Article 16 equivalent to the prohibitions in the Fifth, Eighth and Fourteenth Amendments, this reservation preserves the constitutional prerogatives of the Congress and the President at the federal level, and of the states in formulating policies dealing with corporal pun-

ishment, the death penalty, and other punitive measures permitted by the Constitution. Without this reservation, those who have certain legislative agendas—the abolition of capital punishment, for example—may be tempted to outflank our constitutional processes and ask a judge to declare the death penalty illegal under the Convention. In my opinion, public policy of such serious moment should not be formulated in such an extra-constitutional fashion.

3. Reservation to Article 30. At the present time, the International Court of Justice has not fully lived up to the hopes of those that supported it after World War II. For the past few years, the United States has chosen a course of respectful distance from the Court because of the manner in which it adjudicated the dispute brought by Nicaragua. The policy of using the Court on appropriate occasions is the correct policy. Until major reforms in the Court are brought about to change its current political cast, the United States should not agree to grant automatic jurisdiction to the Court in disputes arising under the Convention. According to Article 30 of the Convention, a reservation not to accept the compulsory jurisdiction of the ICJ made be made at the time of ratification. It may at any time thereafter be withdrawn. However, if the United States does not make its reservation now, it will not be able to in the future unless it denounces the Convention altogether. It is far better the take the cautious route permitted by the Convention, and reserve now while it may be done while we await future developments in the Court.

UNDERSTANDINGS

Article 1. It is my opinion that the definition of torture and the liability for acts of torture need to be appropriately clarified to comport with essential requirements of due process. Specific clarifications need to make clear Anglo-American understandings of the substance of the offense and the extent of liability under the Convention. These understandings are part of the one of the most fundamental attributes of the Rule of Law, namely, *nullum crimen, nulla poene, sine lege:* there may be no punishment without prior clear standards established in the law. To adhere to a Convention without the clarifications that our tradition of protection of the accused requires would be a violation of the legal tradition enshrined in our adherence to due process.

In that vein, I am deeply troubled by the change in the latest State Department version that requires only "awareness" of an activity constituting torture rather than "knowledge." The explanation of the Department of State is that "awareness" means "willful blindness." If that be the case, then "awareness" is a particularly weak term to carry such a meaning. In the history of criminal law, the term "knowledge" is a far better concept, for it means primarily that there be must be specific intent, a necessary prerequisite in our law to criminal liability. Any concept that might fasten the extreme sanction of this Convention to acts of mere negligence is contrary to our deepest traditions of due process.

Article 3. To deport or extradite a person to a country where there is a possibility of his being tortured is prohibited under this Convention. The Convention uses the term "substantial grounds." If, as the State Department suggests, "substantial grounds" mean only "more likely than not," then much of the protection of the Convention is undone. If we are to use an appropriate domestic standard for courts to use, the best analogous standard should be "a well-founded fear of political or religious persecution" only applied in this context to torture.

Article 14. Any state should be cautious in asserting extraterritorial jurisdiction. The purpose of the Torture Convention is to bind states in the prevention and prosecution of those who commit such heinous acts. The Convention was not designed to change the internal civil law of any country. The understanding simply makes the point more clearly.

DECLARATIONS

That the Convention be non-self-executing. Many decades ago, Senator John Bricker proposed a constitutional amendment that would have required that all treaties be non self-executing. The amendment failed. But experience has shown the principle to be a good one. By requiring implementing legislation, our constitutional process of law' making is preserved. Otherwise, our courts will be authorized to interpret a treaty that might have been negotiated for important foreign policy reasons but without sufficient thought as to its domestic repercussions. Only the United States Senate would have the chance for a second look. By requiring implementing legislation, however, the entire Congress, and the President as well, can carefully craft the details of implementation so that courts have sufficient guidance to be able to apply the Convention clearly and consistently.

I cannot close without an answer to the charge of Amnesty International in its November 2, 1988, position that reservations to the Convention "will further erode the United States credibility regarding its commitment to promoting human rights throughout the world." The charge irresponsible and patently false. When the German people celebrated the opening of the Berlin Wall, we saw them waving the German and the American flag, not the banner of the United Nations. Just before the students were crushed in Tiananmen Square, they raised a facsimile of the Statue of Liberty. National Public Radio reported last week that the symbol of freedom for the Rumanian people was the United States system of freedom. When the Panamanian and, earlier, the Grenadan people celebrated their liberation from tyranny, they thanked this country. When the dictator Marcos was removed and the government of President Aquino needed to be protected, the Philippines called upon the United States. When Poland and Hungary led the way in Eastern Europe to freedom, they cheered the President of the United States. When the students of the Soviet Union listened intently to Ronald Reagan, they heard the message of hope. This country and its Constitution is the beacon of human rights. To assure that the Convention of Torture lives up to our constitutional standards is, in fact, a duty we owe to the cause of human rights.

The CHAIRMAN. Thank you very much, indeed.

Next we will hear from Mr. James Silkenat, Chairman of the Section of International Law and Practice of the American Bar Association.

Mr. Silkenat.

STATEMENT OF JAMES R. SILKENAT, CHAIRMAN, SECTION OF INTERNATIONAL LAW AND PRACTICE, AMERICAN BAR ASSOCIATION, NEW YORK, NY

Mr. SILKENAT. Good morning.

I am Jim Silkenat, Chairman of the ABA Section of International Law and Practice and Chairman of the International Human Rights Committee of the Association of the Bar of the City of New York.

I am in the private practice of law in New York City with the firm of Morrison & Forster.

I am appearing here today on behalf of the ABA and the President of the ABA, L. Stanley Chauvan, of Kentucky, because of the ABA's firm support for U.S. ratification of the U.N. Convention Against Torture.

We commend the committee's prompt attention to this issue and the Bush administration for bringing this package to you as promptly as it has.

Support for the torture convention has been the official policy of the ABA since 1986. At that time, my section prepared a report and a resolution which was adopted by the ABA House of Delegates, representing 350 some-odd lawyers from across the United States, urging the United States to ratify this convention.

Significantly, that action was simply in support of ratification of the convention. A conscious decision was made to adopt no formal policy by the ABA on any of the reservations, understandings, or declarations that existed at that time.

Nevertheless, while we will not oppose the inclusion of some qualifying language with regard to the convention, we wish to emphasize the importance and unity of the convention as it was unanimously approved by the U.N. General Assembly in 1984 without any qualifications.

If torture continues to exist, as it surely does, why should we bother with yet another treaty which we will observe and which

the outlaws of the world will ignore? What difference will these few thousands words make?

The short answer is, as lawyers, we must believe that words have meaning; that even law that is not likely to be enforced by certain countries is our only enduring hope and salvation; that ultimately it is the rule of law which distinguishes us from the torturers of the world.

This treaty would establish some important mechanisms that would make torture less likely by all states and would give us, give the United States, an added role in making sure that that comes true.

It is ironic that consideration by the committee of the torture convention is occurring now, at a time when human rights are finally being recognized in nations where freedom was once thought to be only a dream.

As a recent commentary in Newsweek magazine observed, human rights are not an add-on or a frill, an extra sentence in a "real politik" speech. They are what the fight is all about. It is all the more important, then, that the United States add its support to existing international obligations and ratify this treaty.

On behalf of the American Bar Association, I urge the committee to approve the convention against torture.

[The prepared statement of Mr. Silkenat and addenda follow:]

PREPARED STATEMENT OF JAMES R. SILKENAT

Mr. Chairman, and Committee members: My name is James R. Silkenat. I am in the private practice of law in New York, and I currently serve as Chairman of the Section of International Law and Practice of the American Bar Association. I am grateful for the opportunity to appear before you today on behalf of the President of the ABA, L. Stanley Chauvin, Jr. of Louisville, Kentucky, as the Foreign Relations Committee considers this important step toward the eradication of torture in the world.

First of all, I wish to commend you and the other members and staff of the committee, for the promptness with which today's hearing is being conducted. Indeed, the credit is equally due President Bush and his colleagues in the State and Justice Departments, who have seriously undertaken their review of the treaty. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Treaty Doc. 100-20, was submitted to the Senate in May 1988, and this Committee has acted expeditiously in scheduling action today. It is our commitment to work with you and the Executive Branch to assure this treaty is ratified by the United States this year.

As an aside, however, I also wish to express my sincere hope that this will be the first of a series of such hearings on important treaties to which the Senate will give its advice and consent to ratification this year. While Secretary Baker is to be commended for listing ratification of the Torture Convention as one of the highest treaty priorities for this Administration, I do hope that consideration of other, pending treaties—against racial and gender discrimination, among others which have been languishing for over a decade—will be given prompt attention as well.

I am reminded of the December 1988 speech at Georgetown University by then President of the ABA, Robert Raven on the commemoration of the 40th anniversary of the approval by the United Nations of the Universal Declaration of Human Rights. After reviewing the substantial progress in recent years in fashioning new commitments to the rule of law in our dealings with other countries, President Raven listed as his first priority for action in the 101st Congress the prompt ratification of the six pending human rights treaties. A year later we are moving on one, but there remain the conventions on Discrimination Against Women, on Racial Discrimination, the American Convention on Human Rights, and the important treaties to full—and finally—implement the Universal Declaration, the Covenants on Civil and Political Rights and Economic, Social and Cultural Rights. So while we commend our progress, we should not lose sight of the reality of our unfinished

work, an agenda which might be more manageable if the Senate were to more regularly consider sending treaties.

Mr. Chairman, the American Bar Association's support for the Torture Convention has been the official policy of the ABA since February 1986. At that time, the Section of International Law and Practice prepared a report and a resolution, which was adopted by our House of Delegates, urging the United States to ratify the Convention Against Torture. Significantly, that action was in support of ratification of the treaty, along, and a conscious decision was made to adopt no formal policy on any reservations, understandings or declarations. Thus, while we will not oppose the inclusion of some qualifying language, we wish to emphasize the importance and unity of the treaty as it was unanimously approved by the United Nations General Assembly December 10, 1989, without any qualifications. We believe that failure to ratify this basic statement of our civilized revulsion against torture, particularly after the United States played such a leading role in fashioning the Convention, would make us a ready target for those who would disparage our commitment to the rule of law in governing the relations among nations.

The United Nations has been undertaking efforts to abolish torture for many years, and the Convention Against Torture is one result of these efforts. In 1973, the United Nations adopted a resolution rejecting any form of torture. The next year it launched the initial stage of a program to set standards for the prevention of torture. The first official declaration against torture was issued by the United Nations in 1975, and that declaration served as a basis for the development of the Convention Against Torture before us today. Mr. Chairman, at the beginning of this Committee's hearings on June 26, 1984 on the practice of torture by foreign governments, you observed that:

The moral and legal prohibitions against torture have been increasing since 1948 when the United Nations stated in the Universal Declaration of Human Rights that, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The Geneva Convention of 1949, the International Covenant on Civil and Political Rights, a variety of United Nations rules, codes and declarations including the 1975 Declaration on the Protection of All Persons From Torture, and human rights conventions adopted by the organization of American States, the Organization of African Unity and the European Community make it clear that torture is absolutely forbidden by international law. Yes, in spite of this ever-growing body of law, individuals are subject to torture in 198 countries according to Amnesty International's *latest* report.

If this is the case, as it surely is, why should we bother with yet another treaty we will observe, and the outlaws of the world will ignore? What difference will these few thousand words make? The short answer is, as lawyers we must believe words have meaning, that law—even law not likely to be enforced by some police force—and the rule it generates is our only enduring hope and salvation. That, ultimately, it is the rule of law which distinguishes us from the tortures of the world. This treaty would establish some important mechanisms.

The convention establishes within the body of international law the crime of torture, as well as "cruel, inhuman or degrading treatment or punishment" which do not amount to torture as it is defined by the treaty.

Importantly, the convention establishes a system of universal jurisdiction under which there can be no "safe haven" for torturers. The convention requires all states to exercise jurisdiction over torture committed in their territory, and provides that states parties either extradite or prosecute the offender. This provision is similar to the provisions found in the hijacking conventions and other antiterrorist conventions the United States has ratified.

Under the Convention, victims of torture are afforded the right to have their complaints and their claims investigated as well as to be entitled to the establishment of a fair and adequate compensation mechanism. The treaty also ensures that statements which are extracted as a result of torture may not be used against the victim as evidence, thus removing a major "incentive" for the use of torture.

The convention has established a Committee Against Torture, which receives reports on ratifying states' implementation of the convention and information about alleged acts of torture which it may then investigate. The findings of the committee are extremely important in lending international weight to the fight against torture.

The committee serves more as an investigative body than a judicial one, but the importance of its role cannot be overstated. In bringing the allegations of torture to the attention of the public, the committee functions as a forum and a lightening rod for the expression of world opinion. One need look no further than the stunning events occurring in Eastern Europe, Soviet Union and elsewhere to find a dramatic

example of how world opinion affects a government's decisions regarding its adherence to the rule of law and recognition of basic human rights. Indeed, one of the real strengths of the treaty is the role to be played by the committee.

The United States has had a long history of support for - international efforts against torture, and we played a major role in drafting this treaty. In 1984, Congress passed the Joint Resolution Against Torture (P.L. 98-447), committing the United States to combat the practice of torture. It is important to note' that there is nothing in the proposed convention which conflicts with the United States Constitution or law; in fact several provisions of our law relating to torture or cruel, inhuman or degrading treatment or punishment actually exceed the standards established by the convention.

Turning briefly to the Administration's package, we have a few specific observations. First, the proposed understanding to Article 1 - concerning the application of the definition of torture to a victim who is in the "custody or physical control" of the wrongdoer is overbroad. The text of Article 1 itself clearly defines torture as the infliction of the wrongful act "at the instigation of or with the consent or acquiescence of a public official." Furthermore, this broader application is supported by the negotiating history, which indicates that, "It was generally agreed that the definition of acts committed by public officials should be expended to cover acts committed by, or at the instigation of, or with the consent or acquiescence of a public official or any other person acting in an official capacity." 35 U.N. ESCOR para. 18, U.N. Soc. E/CN.4/1347 (1979). There is, therefore, no support either in the text or in the negotiating record for the limiting understanding. We suggest that the meaning of Article 1 will be more clear if the understanding is stricken.

Second, a review of the proposed understanding to Article 3, concerning the applicable standard for refouler, and the negotiating record, suggest the understanding is unnecessary. Article 3 provides that a state shall not expel, return or extradite a person "where there are substantial grounds for believing that he would be in danger of being subjected to torture." The understanding seeks to make substantially more difficult this test by substituting the meaning, "if it is more likely than not that he would be tortured." First, the subjective "belief" in the text has been removed, reducing the test to a surely objective 51 percent test. Furthermore, the actual text only directs that there be substantial grounds for believing the person "would be in danger" of being tortured whereas the understanding simply applies the percentage test to whether a person would be tortured.

Furthermore, the negotiating record is clear that the purpose of Article 3, not surprisingly, "was to afford the greatest possible protection against torture and that the evidentiary requirement should not be too rigorous and should be kept to a minimum." 35 U.N. ESCOR para. 44, U.N. Doc. E/CN.4/1347 (1979). This understanding, therefore is confusing and should be removed.

Finally, the proposed reservation to Article 16 appears, in fact, to be an understanding. However, in light of a new understanding concerning capitol punishment we understand will be proposed, we simply suggest that the new understanding be substituted for this reservation.

Mr. Chairman, it is ironic that consideration by the committee of the Torture Convention is occurring now—a time when human rights are finally being recognized in nations where freedom was once thought to be only a dream. As a recent commentary in *Newsweek* observed, "Human rights are not an add-on, a frill, an extra sentence in a realpolitik speech. They are what the fight is about." It is all the more important, then, that the United States add our support to existing international obligations and ratify this treaty. On behalf of the American Bar Association, I urge the committee to approve the Convention Against Torture.

LETTER FROM U.S. DEPARTMENT OF STATE

Hon. CLAIBORNE PELL,
Chairman, Committee on Foreign Relations, U.S. Senate, Washington, DC.

Dear Mr. Chairman: In his message of May 23, 1988, President Reagan transmitted the convention against Torture and other cruel, Inhuman or Degrading Treatment or Punishment to the Senate for its advice and consent to ratification. As you know, the convention was adopted by unanimous agreement of the United Nations General Assembly on December 10, 1984, and entered into force on June 26, 1987. The United States signed it on April 18, 1988. Accompanying the transmittal of the convention to the Senate was the report of the Secretary of State containing a number of proposed reservations, understandings and declarations.

In your letter to the Secretary of State dated July 24, 1989, you expressed concern that the Administration's proposed package faced substantial opposition from human rights groups and other interested parties. In particular, you were concerned with the overall length and breadth of the package, and the understandings concerning the definition of torture. According to critics of the proposed package, the understandings to the definition of torture could be construed to raise "the threshold of pain that an individual must suffer" and to permit "certain circumstances an' justifications for torture."

By letter of September 20, 1989, we agreed to review the original package and simultaneously informed you that we planned to drop the proposed reservations pursuant to Article 28(1) not recognizing the competence of the committee against Torture provided for in Article 20 and that we further planned to make a declaration pursuant to Article 21 of the Convention, recognizing the competence of the committee to receive and consider, on a reciprocal basis, communications from States alleging that the United States is violating the convention.

We have now completed that review, and I am pleased to submit herewith the enclosed revised package of reservations, understandings and declarations for consideration by the Senate. Reflecting our consultations with various interests in the private sector, the package now contains a revised understanding to the definition of torture, which would not raise the high threshold of pain already required under international law, clarifies the definition of mental pain and suffering, and maintains our position that specific intent is required for torture. The revised package also eliminates the understanding relating to "common-law" defenses, makes it clear that the United States does not regard authorized sanctions that unquestionably violate international law as "lawful sanctions" exempt from the prohibition on torture, and removes our reservation to the obligation not to extradite individuals if we believe they would be tortured upon return. (Of course, consistent with our letter of September 20, 1989, the revised package contains a declaration pursuant to Article 21 of the convention, recognizing the competence of the committee against Torture to receive and consider, on a reciprocal basis, communications from states alleging that the U.S. is violating the convention.)

Our revised package is the result of lengthy discussions among the Departments of State, Justice, and Defense. We look forward to the opportunity to explain fully the administration's proposed revised package of reservations, understandings, and declarations at the hearing before the Committee on Foreign Relations early next session. Each of the reservations, declarations and understandings to the convention in the revised package is explained briefly in the enclosure.

Sincerely,

JANET G. MULLINS,
Assistant Secretary for Legislative Affairs.

RESERVATIONS

"The United States shall implement the convention to the extent that the Federal Government exercises legislative and judicial jurisdiction over the matters covered therein; to the extent that constituent units exercise jurisdiction over such matters, the Federal Government shall take appropriate measures, to the end that the competent authorities of the constituent units may take appropriate measures for the fulfillment of this Convention."

Explanation: Retained without modification from the 1988 transmittal.

2. Article 16

"The United States considers itself bound by the obligation under Article 16 to prevent cruel, inhuman or degrading treatment or punishment, only insofar as the term cruel, inhuman or degrading treatment or punishment means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments' to the constitution of the United States."

Explanation: changed from an understanding to a reservation.

3. Article 30

"Pursuant to Article 30(2) of the convention, the United States declares that it does not consider itself bound by Article 30(1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case."

Explanation: Retained without modification from the 1988 transmittal.

UNDERSTANDINGS

a. "The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality."

Explanation: Revised to clarify the definition of mental harm.

b. "The United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control."

Explanation: Retained without modification from the 1988 transmittal.

c. "The United States understands that sanctions includes judicially-imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law provided that such sanctions or actions are not clearly prohibited under international law."

Explanation: Revised to require that, for purposes of the definition of lawful sanctions, any U.S. actions or sanctions permitted under U.S. law be not clearly prohibited under international law.

d. "The United States understands that the term acquiescence requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity."

Explanation: Changed "knowledge" to "awareness" to make it clearer that both actual knowledge and willful blindness fall within the meaning of "acquiescence."

e. "The United States understands that noncompliance with applicable legal procedural standards does not *per se* constitute torture."

Explanation: Retained without modification from the 1988 transmittal.

2. Article 3

"The United States understands the phrase, where there are substantial grounds for believing that he would be in danger of being subjected to torture, as used in Article 3 of the convention, to mean if it is more likely than not that he would be tortured."

Explanation: Retained without modification from the 1988 transmittal.

3. Article 14

"It is the understanding of the United States that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party."

Explanation: Retained without modification from the 1988 transmittal.

DECLARATIONS

1. General

"The United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing."

Explanation: Retained without modification from the 1988 transmittal.

2. Article 21

"The United States declares, pursuant to Article 21, paragraph 1, of the Convention, that it recognizes the competence of the committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention. It is the understanding of the United States that, pursuant to the above mentioned article, such communications shall be accepted and processed only if they come from a State Party which has made a similar declaration."

Explanation: Corollary to dropping the reservation in the previous package that declared that the United States does not recognize the competence of the committee against Torture under Article 20.

OMISSIONS

The following reservations, declarations and understandings in the 1988 transmittal have been deleted. We will explain in full before the Senate the reasons for their deletion.

Reservations Omitted:

"The United Stated does not consider itself bound by Article 3 insofar as it conflicts with the obligations of the United States toward States not party to the convention under bilateral extradition treaties with such States."

Explanation for deletion: Upon further reflection, this provision was deemed unnecessary because it could be construed to indicate that the U.S. was retaining, insofar as it relates to nonparties, the juridical right to send a person back to a country where that person would be tortured. Such was never the intent.

"Pursuant to Article 28(1), the United States declares that it does not recognize the competence of the committee against torture under Article 20."

Explanation for deletion: See declaration under Article 21 above.

Understanding Omitted:

"The United States understands that paragraph 2 of Article 2 does not preclude the availability of relevant common law defenses, including but not limited to self-defense and defense of others."

Explanation for deletion: Upon reflection, this understanding' was felt to be no longer necessary.

Declarations Omitted:

"The United States will not deposit the instrument of ratification until after the implementing legislation of the Convention has been enacted."

Explanation for deletion: Although it remains our intention to not deposit the instrument of ratification until after the implementing legislation of the convention has been enacted, it is not necessary that this declaration be included in the formal instrument of ratification.

"The United States declares that the phrase, competent authorities, as used in Article 3 of the convention, refers to the Secretary of State in extradition cases and to the Attorney General in deportation cases."

Explanation for deletion: Although it remains true that the competent authorities referred to in Article 3 would be the Secretary of State in extradition cases and the Attorney General in deportation cases, it is not necessary to include this declaration in the formal instrument of ratification.

"The United States declares that it will submit a case involving alleged torture committed by an alien outside the United States to its competent authorities for the purpose of prosecution, pursuant to Article 7(1) of the convention, only if extradition of the offender to the State where the offense was committed is not an adequate alternative."

Explanation for deletion: Although it remains our intention to submit a case for prosecution only when extradition is not an adequate alternative, it is not necessary to include this declaration in the formal instrument of ratification.

The CHAIRMAN. Thank you very much, indeed.

We now come to Mr. Rice.

STATEMENT OF CHARLES RICE, PROFESSOR OF LAW, NOTRE DAME LAW SCHOOL, NOTRE DAME, IN

Mr. RICE. Thank you, Senator.

I have submitted my prepared statement and would just like to add a few comments here very briefly on specific reservations which I have suggested.

The first thing to understand, I believe, is that this treaty is not necessary to prevent torture in the United States; that the United States Constitution is, itself, an adequate defense against torture.

I have suggested several reservations in line with what this morning Senator Helms has suggested, the parallel between this treaty and the genocide convention.

For example, I propose that there be a specific reservation which tracks a reservation adopted to the genocide convention to provide that nothing in this Torture Convention requires or authorizes legislation or other action by the United States prohibited by the Constitution, and so on.

There are other specific proposals that I would like to go through very quickly.

On the sanctions question, I agree with the transmittal proposal. I find it very strange that we are incorporating this vague notion of international law in that sanctions question. But I think it should be a reservation, as practically all these conditions should be.

The definition of torture in article 1 illustrates the major defect in this convention, that it is an effort to make domestic law through the treaty process. I am concerned that whatever statutory definition is finally adopted in the implementing act of torture will find its way into state law and into other Federal law.

The State Department has made a heroic effort to narrow that definition, and it doesn't work.

For example, their phrase, "or other procedures calculated to disrupt profoundly the senses or the personality," is there anybody in this room that can tell me what that means?

Certainly I would not want to entrust the liberty or the life of a defendant to the interpretation of that kind of phrase.

So, I suggest a reservation to provide that no act shall be regarded as torture under the convention unless that act is committed under color of law, so as to eliminate private action—that comes up under article 4—unless that act is committed under color of law with specific criminal intent and is itself, apart from this convention, a violation of the 5th, 8th, or 14th Amendments to the Constitution.

Skipping over some of the other materials which are in my prepared statement, I would suggest that, with respect to the obligations of the United States under the convention generally and including, particularly, articles 2, 14, and 16, the obligations of the United States—this would be a reservation—apply only with respect to conduct under color of law, which is, apart from the convention, a violation of the 5th, 8th, or 14th Amendments to the Constitution.

Under the question of exclusion under article 3, deportation and extradition, two different statutes were involved in the *Stevic* case, which involved the more likely standard which the administration proposed, and in the *Cardoza-Fonseca* case, which involved the well-founded fear of persecution standard.

I would suggest that the United States should not try to nail a specific standard into its reservations, but, rather, should adopt a reservation to provide that the determination under article 3 as to whether there are substantial grounds for believing he will be subjected to torture, shall be made sclely by the United States.

When you move on to that question Senator Helms raised with respect to Yemen and the problem under article 7, the prosecution of the alien in the United States, as an alternative to extradition, the declaration proposed in the transmittal should be retained as a

reservation, provided that we should add at the end, the words "as determined solely by the United States."

I believe this would include implicitly an understanding that was adopted to the genocide convention, and the understanding provided that extradition under the genocide convention was subject to the dual criminality standard; that there would be extradition only if the act were criminal under the law of both parties.

That is adequate for my oral presentation because the whole thing is in the written statement, Senator.

[The prepared statement of Mr. Rice follows:]

PREPARED STATEMENT OF CHARLES E. RICE

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is a laudable statement of the determination of the signatory nations to eliminate the invidious conduct against which the Convention is directed. However, there are some ambiguities and other weaknesses in the Convention which ought to be corrected by reservations to which the Senate's advice and consent would be subject. President Reagan's May 23, 1988, transmittal of the Convention Against Torture was accompanied by a report of the Secretary of State proposing reservations, understandings and declarations. Senate Treaty Doc. 100-20, 100th Cong., 2d Sess. (1988). The Department of State has since modified those proposals. This testimony will offer comments on the transmittal and later State Department proposals and will suggest other reservations for the consideration of this committee. Reservations ought to be employed rather than understandings or declarations because of the more certain binding effect of reservations. I suggest the following:

General Reservations: Non-self-executing character of the Convention.— This was included in the President's 1988 transmittal and in the December 1989, State Department memo as a declaration. It ought to be a reservation.

Federal-State Reservation.—Included in both the transmittal and the State Department memo. I agree.

Supremacy of the Constitution.—I suggest the following reservation: "That nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."

This is adapted from a reservation adopted by the Senate to the Genocide Convention.

RESERVATIONS TO SPECIFIC ARTICLES

Article I: Application to acts only in custody or physical control.—This was proposed by the transmittal and the State Department as an understanding. It should be a reservation.

Sanctions.—I agree with the transmittal proposal rather than with that of the State Department which would subject the sanctions defense to the limitations of international law. The transmittal proposal should be a reservation rather than an understanding.

Acquiescence.—The State Department version would describe "acquiescence" as including mere "awareness." The transmittal proposed "knowledge" as the criterion. I would make it "actual knowledge." This should be a reservation.

Definition of Torture.-Neither the transmittal nor the State Department proposal is adequate. This problem of the definition of torture illustrates the major flaw in the Convention as applied to the United States, that it would use the treaty process to formulate and enact domestic law for the United States. Whatever definition of torture is adopted by reservation could be likely to find its way into Federal and State law. Even with the detailed State Department formulation, serious problems of vagueness remain. For example, "or other procedures calculated to disrupt profoundly the senses or the personality." Can anyone say with any significant precision what that means? I suggest the following reservation: "That no act shall be regarded as torture under the Convention unless that act is committed under color of law with specific criminal intent and is in itself, apart from this Convention, a violation of the Fifth, Eighth or Fourteenth Amendment to the Constitution of the United States."

This reservation would ensure that acts of private individuals, not acting under color of law, would not be considered "torture" or "complicity or participation in

torture" (see Article 4) under the Convention. It would also incorporate the Fifth, Eighth and Fourteenth Amendment protections against vagueness and other defects. This would avoid a fruitless effort to devise in the Convention a foolproof definition of mental harm or pain.

NONCOMPLIANCE WITH LEGAL PROCEDURES

This should be a reservation but the version proposed in identical terms by the transmittal and the State Department should be broadened to prevent mere noncompliance with legal procedures from being used as evidence of torture. As proposed by the transmittal and the State Department, the language is unsatisfactory. What does it accomplish to recite merely that noncompliance is not *per se* torture? How could noncompliance with legal procedures be itself, i.e., *per se* torture, in light of the detailed definition of torture in Article 1? I suggest the following reservation: "That noncompliance with applicable legal procedural standards shall not of itself be admissible in any criminal or other proceeding as evidence of torture."

Article 2: Common Law Defenses.—The understanding proposed by the transmittal should be retained but should be made a reservation.

Obligations of the United States limited to constitutional violations.—With respect to the obligations of the United States in general under the Convention, I suggest the following reservation: That the obligations of the United States under the Convention apply only with respect to conduct under color of law which is, apart from this Convention, a violation of the Fifth, Eighth or Fourteenth Amendment to the Constitution of the United States.

This reservation is a counterpart to the reservation I proposed above, with respect to the definition of torture under Article 1. It would prevent the ambiguities in the definitional and other provisions of this Convention from imposing obligations on the United States which would be disruptive of Federal-State relations or otherwise inconsistent with the Constitution. The Constitution and the laws of the United States and of the 50 States already contain adequate prohibitions of the conduct against which this Convention is directed.

Article 3: Expulsion. Deportation and Extradition.--The transmittal and Department of State both proposed an understanding that the provision of Article 3 that "no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture" should be interpreted, in accord with *INS* v. *Stevic*, 467 U.S. 407 (1984), to mean, "if it is more likely than not that he would be tortured." *Stevic* involved the issue of whether withholding of deportation was justified under section of the Immigration and Nationality Act, 8 U.S.C. Sec. 1253(h). The *Stevic* court interpreted this statute to require proof that it is "more likely than not that the alien would be subject to persecution on one of the specified grounds." 467 U.S. at 429-30. In *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987), the Supreme Court dealt with the issue of asylum applications under section 208(a) of the Immigration and Nationality Act, 8 U.S.C. Sec. 1158(a), which statute authorized the Attorney General to grant asylum to a refugee who is unable to unwilling to return to his home country because of persecution or a "well founded fear of persecution" on account of specified grounds. The Court held in *Cardoza-Fonseca* that, "to show a 'well-founded fear of persecution,' an alien need not prove that it is more likely than not that he or she will be persecuted in his or her home country." 480 U.S. at 449.

Article 3 would apply to any case in which the United States would seek to expel, return or extradite a person. It would evidently apply to deportation and asylum cases as well as extradition cases. The understanding proposed by the transmittal and the Department of State sought to harmonize the obligation of the United States under Article 3 with the Supreme Court's interpretation of Section 243(h) of the Immigration and Nationality Act in *Stevic*, a deportation case. In view of the different criterion enunciated by the Court in *Cardoza-Fonseca*, an asylum case, it would seem preferable to leave unspecified the United States interpretation of "substantial grounds" in Article 3. I suggest the following reservation: That the determination under Article 3 as to whether "there are substantial grounds for believing that he would be in danger of being subject to torture," shall be made solely by the United States.

Extradition to non-signatory states.—The reservation proposed in the transmittal could be subject to misunderstanding as an indication of a possible willingness on the part of the United States to expel or extradite a person to some nonsignatory state despite the existence of substantial grounds for believing that that person would be in danger of being tortured. I agree with the State Department's later rec-

ommendation that this reservation be deleted as unnecessary and potentially misleading. Any obligation assumed by the United States under Article 3 of this Convention would not prevent the performance of any inconsistent terms of a bilateral extradition treaty between the United States and a State not signatory to this Convention.

Definition of "competent authorities" under Article 3.—I agree with the later State Department view that this declaration proposed by the transmittal should be deleted. It is not necessary to include this delineation of intra-governmental authority in the formal instrument of ratification. Moreover, in light of the judicial inquiry authorized by Article 3(a) of the Supplementary Extradition Treaty with the United Kingdom, the Department of State would not be the only competent authority to decide issues raised by Article 3 of this Convention in extradition cases.

Article 5: Deposit of instrument of ratification.—This declaration, proposed in the transmittal, is essentially the same as a declaration adopted by the Senate with respect to the Genocide Convention. It is appropriate to include it as well in this Convention as a declaration.

Article 7: Prosecution of alien in the United States only if extradition to state where offense was committed is not available.—This declaration, proposed in the transmittal, should be retained as a reservation, with the addition of the following words at the end, "as determined solely by the United States," so that it would provide: The United States declares that it will submit a case involving alleged torture committed by an alien outside the United States to its competent authorities for the purpose of prosecution, pursuant to Article 7(1) of the Convention, only if extradition of the offender to the State where the offense was committed is not an adequate alternative as determined solely by the United States.

Right to compensation in torture cases.—I suggest the following reservation: That the obligation of the United States to provide a right to compensation under Article 14 is limited to cases involving conduct under color of law in which, apart from the Convention, a right to compensation is provided by the Constitution or laws of the United States.

This reservation is necessary to prevent Article 14 from being interpreted to require a general right of compensation from federal officers comparable to the right existing against state officers under 42 U.S.C. Sec. 1983.

Article 16: Obligation of the United States limited to constitutional violations.—See above under Article 2. The reservation proposed above under Article 2 would render unnecessary the comparable understanding with respect to Article 16 proposed in the transmittal, which was proposed as a reservation by the Department of State.

Articles 20 and 21: Competence of the Committee on Torture.—For the reasons stated at p. 17 of the transmittal, I suggest that the language proposed by the transmittal be retained as a reservation. The State Department's proposed declaration on this subject is imprudent in its recognition of the competence of the Committee on Torture.

Article 30.—I agree with the reservation proposed by the transmittal and the Department of State but would suggest the following additional separate reservation: "That with reference to Article 30 of this Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case."

This reservation is essentially the same as a reservation adopted by the Senate to the Genocide Convention.

The CHAIRMAN. Thank you very much, indeed, Professor a Rice. I would ask unanimous consent to insert a statement from a group of citizens groups into the record.

[The information referred to follows:]

We strongly endorse the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture) and urge the Senate Committee on Foreign Relations to promptly recommend Senate advice and consent to ratification. Torture is a direct violation of the human rights our organizations strive to protect and promote. There are no circumstances in which torture can be justified, nor can there be any legitimate defense offered for it. The civilized world developed this Convention not only to express its revulsion at the practice, but also as a tool with which to uncover, prosecute, and punish torture.

The Convention against Torture was adopted unanimously by the United National General Assembly in 1984, and entered into force in 1987. The United States par-

ticipated actively in drafting the Convention and signed it on April 18, 1988. The Convention was then transmitted by President Reagan for advice and consent to ratification. The United States is the only member of the U.N. Security Council which has not ratified the Convention.

The Treaty contains a number of provisions which would make it more difficult for states to practice torture and for individuals to escape punishment for the crime of torture. The impact of these provisions would also prevent torturers from claiming that their acts did not constitute torture. The Convention further requires measures to prevent torture and punish violators when torture takes place. The force of these and other provisions should not be compromised or weakened by reservations, declarations, or understandings.

U.S. ratification of the Convention Against Torture would send an important signal to the world about U.S. concern for human rights and its determination to combat torture with every available tool. It also allows the United States to join with other countries in pursuing and prosecuting torturers. Moreover, we believe that United States ability to pursue a persuasive, constructive, and credible human rights policy will suffer until the United States takes formal steps to accept those standards of international conduct by which it evaluates other States. We therefore urge you, in the strongest possible terms, to support the United Nations Convention Against Torture, and work towards its immediate ratification.

Supporters for the U.N. Convention Against Torture: American Jewish Committee; Anti-Defamation League of B'nai B'rith; The Armenian Assembly of America; National Spiritual Assembly of the Baha'is of the USA; Baptist Joint Committee on Public Affairs; B'nai B'rith Women; B'nai B'rith International Council; Central Conference of American Rabbis; Franklin and Eleanor Roosevelt Institute; Freedom House; Friends Committee on National Legislation; Indochina Resource Action Council; International Human Rights Law Group; Jewish Labor Committee; Jewish War Veterans of the USA; Evangelical Lutheran Church in America; National Council of Churches; National Council of Jewish Women; Procedural Aspects of International Law Institute; Union of American Hebrew Congregations; and the United States Catholic Conference.

The CHAIRMAN. I would now turn to Mr. Weissbrodt.

STATEMENT OF DAVID WEISSBRODT, BRIGGS & MORGAN PROFESSOR OF LAW, UNIVERSITY OF MINNESOTA, ON BEHALF OF THE CENTER FOR VICTIMS OF TORTURE, THE MINNESOTA LAWYERS INTERNATIONAL HUMAN RIGHTS COMMITTEE, MINNEAPOLIS, MI

Mr. WEISSBRODT. Thank you, Chairman Pell, for the invitation to speak before your committee.

I am testifying today as a representative of the Center for Victims of Torture and the Minnesota Lawyers International Human Rights Committee. Both are headquartered in Minneapolis.

Since we have such a short time, I hope that I can submit for the record an analysis of the Treaty Against Torture and the reservations, understandings, and declarations.

The CHAIRMAN. Without objection, that will be printed in full.

Mr. WEISSBRODT. The Center for Victims of Torture, the Minnesota Lawyers Committee, and our clients urge you to give the advice and consent of the Senate to the Treaty Against Torture as soon as possible.

Minnesota may seem an unlikely place to which torture victims would flee. But there are about 6,000 victims of torture from all over the world in Minnesota alone, and there are estimated to be 100,000 such victims who have found refuge in the United States.

They come from the two-thirds of the world's countries where torture is practiced.

Torture has no ideology. It is practiced by governments of both the right and the left, as confirmed by the clients who seek the help of the center.

Unfortunately, torturers learn from each other. Repressive governments share torture techniques and integrate advances in science to accentuate pain and psychological damage.

I have submitted to the committee staff a manual on torture distributed to mercenaries. This manual confirms what we have concluded from our clients, that the goal of torture is to cause intense physical pain, humiliation, and long-term psychological damage on individuals.

But the ultimate objective of torture is to terrorize the entire community and to render them politically inactive.

The center has helped people who have been subjected to electroshocks, being hanged by hands and feet, cigarette burns and other atrocities. Unless treated, these individuals will suffer long-term psychological damage, and that impact will include their families, friends, and communities.

It is frustrating for us, who have to try to heal the wounds of those who have suffered from torture, not to have some way to stem the flow of those who come 'to seek our help. That is why it is so urgent to ratify this treaty soon, rather than after 35 or 40 years.

Stopping torture should be a primary objective of the United States foreign policy and the policies of all countries.

The Treaty Against Torture will confirm the obligation of the United States and other countries to prevent torture and other cruel, inhuman, or degrading treatment or punishment.

The treaty rejects the idea that in some circumstances, torture might be acceptable.

The treaty will expose, and thus will help, prevent torture. It will provide the basis for investigating, adjudicating, criticizing, and ultimately preventing torture.

The treaty cannot immediately erase torture from the world. But it will provide a useful tool to stop this horrendous practice.

Ratification will demonstrate the commitment of the United States to ending this ongoing tragedy.

Now, the United States has nothing to fear from the ratification of this treaty against torture. The United States does have a good record in human rights.

The limitations on the treaty proposed by the administration, however, and by some of the witnesses here, particularly as to articles 3 and 16, as well as to the self-executing nature of the treaty, give the unfortunate impression that some attorneys, and particularly government attorneys, are trying to minimize the protection this treaty will provide.

None of the 50 governments which have ratified have interposed anywhere close to this number of limitations.

In regard to article 16, for example, we need to prevent not only torture, but cruel, inhuman, or degrading treatment or punishment. Sophisticated interrogators, for example, in Northern Ireland, have used a group of techniques, such as forcing individuals to stand for long periods, "hooding," incessant noise, sleep deprivation, and refusing food and drink. This combination of techniques

was found by the European Court of Human Rights not to constitute torture but only inhuman or degrading treatment or punishment.

The administration's reservation to article 16 will make it more difficult for the United States to complain about such ill treatment.

Further, the reservation would diminish the treaty's application to the ill-treatment of children and of mental patients. Those vulnerable people should not be deprived of the treaty's protection.

In conclusion, we urge you to give your advice and consent to the treaty against torture promptly with as few limitations as possible.

Thank you.

[The prepared statement of Mr. Weissbrodt and addenda follow:]

PREPARED STATEMENT OF DAVID WEISSBRODT

Thank you, Chairman Pell, for the invitation to speak before your committee.

I'm a law professor at the University of Minnesota.[1] I am testifying today as a representative of the Center for Victims of Torture and the Minnesota Lawyers International Human Rights Committee. Both are headquarterd in Minneapolis.

Because I have only a few minutes to talk with you, I would ask the committee's permission to submit for the hearing record an analysis of the Treaty against Torture and the Administration's proposed reservations, understandings, and declarations.

The Center for Victims of Torture, the Minnesota Lawyers Committee, and our clients urge you to give your advice and consent for the ratification of the Treaty against Torture. Minnesota may seem an unlikely place to which torture victims would flee. Nonetheless, there are about 6 thousand victims of torture from all over the world who live in Minnesota alone. There are estimated to be over 100,000 victims of torture who have found refuge in the U.S. They come from the two-thirds of the world's countries which practice or condone torture. Torture has no ideology; it is practiced by governments of both the right and the left, as confirmed by the clients who seek help at the Center.

Unfortunately, torturers learn from each other. Repressive governments share torture techniques and integrate advances in science to accentuate pain and psychological damage. I have submitted to the Committee staff a manual on torture distributed to mercenaries. This manual confirms what we had concluded from our clients: that the goal of torture is to cause intense physical pain, humiliation, and long-term psychological damage on individuals. But the ultimate objective of torture is to terrorize the entire community and render it politically inactive. The Center has helped people who have been subjected to electro-shocks, cigarette burns to the body, hanging by hands and feet, and other atrocities. Unless treated, torture has a life-long impact on the victims, their families, friends, and communities. It is frustrating for us who try to heal the wounds of torture to believe that we have no recourse to stem the flow of victims who come to us for help.

Stopping torture should be a primary objective of U.S. foreign policy and the policies of all governments. The Treaty against Torture will confirm the obligation of the United States to prevent torture and other cruel, inhuman or degrading treatment or punishment. The treaty rejects the idea that in extreme circumstances torture may be necessary. The treaty is a law; it must be enforced to be effective. The treaty will expose and thus help prevent torture. It will provide a basis for investigating, adjudicating, criticizing, and ultimately preventing cases of torture. The treaty cannot immediately erase torture from the earth. But it will provide a useful tool to stop the horrors people are suffering. Ratification will demonstrate that the United States is committed to ending this ongoing tragedy.

The United States has nothing to fear from ratifying the Treaty against Torture. The U.S. generally has a good human rights record. The limitations on the treaty proposed by the administration, however, particularly as to Articles 3 and 16 as well as the treaty's self-executing application—give the unfortunate impression that at least some of the government attorneys are trying to minimize the protection this treaty will provide. None of the 50 governments, which have ratified the Treaty against Torture, have interposed so many limitations. In regard to Article 16, for

[1] While I the Briggs & Morgan Professor at the University of Minnesota School of Law, I am not speaking today for the University of Minnesota or the Briggs & Morgan law firm.

example, we need to prevent not only torture, but also other cruel, inhuman or degrading treatment or punishment. Sophisticated interrogators, for example in Northern Ireland, have used a combination of techniques such as forcing individuals to stand for long periods, hooding, incessant noise, sleep deprivation, and refusing food and drink. This combination of techniques was found by the European Court of Human Rights to be inhuman or degrading treatment or punishment, but not torture. the administration's reservation to article 16 will make it more difficult for the U.S. to complain about such ill-treatment. Further, the administration's reservation would diminish the treaty's application to the ill-treatment of children and mental patients. Those vulnerable people should not be deprived of the treaty's protection.

We urge you to give your advice and consent to the Treaty against Torture with as few limitations as possible.

Thank you.

CLIENT FACT SHEET

The Center For Victims of Torture is a non-profit agency that was founded in 1985 to promote treatment for survivors of politically motivated torture by foreign governments, and their families. In addition, the Center serves as an information, education and training rsource, and provides research toward effective treatment for survivors, as well as toward the prevention of torture itself.

The Center's multi-disciplinary treatment team of three full-time and two part-time staff provides clients with medical assessment and long-term medical care, psychological assessment and long-term psychotherapy, psychiatric evaluation and follow-up, advocacy and social work services, as well as pro bono legal assistance, through a cooperative arrangement with the Minnesota Lawyers International Human Rights Committee. The treatment function of the Center for Victims Of Torture officially began in 1987.

Since May 1987, the Center has received calls from 334 potential clients. Of these, 126 did not fit our guidelines as victims of political torture, as defined by the World Health Organization. They were victims of abuse by family members, victims of cults or institutional abuse, victims of combat stress or medical malpractice The remaining 208 people did fit our criteria as victims of political torture.

Of these 208 persons, 73 refugees and three American citizens have received, or are in the process of receiving assessment or long-term intervention in the form of support counselling or therapy at the Center. Seventy of these persons are survivors of torture and seven are family members of victims. They come from Afghanistan (1), Cambodia (7), Chile (1), El Salvador (6), Ethiopia (22), Guatemala (1), Honduras (1), Iran (10), Laos (1), Liberia (1), Nicaragua (1), Romania (4), Somalia (1), South Africa (8), South Korea (1), Viet Nam (6); three American citizens and a survivor of the Nazi Holocaust. Fourteen of these persons are female (18 percent) and 62 are male (82 percent). They range in age from 18 to 51 years. An additional nine persons have received only medical care, 10 have received short-term support counselling, 2 cases are pending, 25 cases have received consultation services, 53 cases have been referred to other service agencies, and 33 have requested information only.

Immigration Status: 30 percent are refugees, 5 percent American citizens and 65 percent are political asylees in the process of applying for asylum.

The 69 survivors of torture who have undergone long-term intervention reported the following types of torture:

Symptoms	Number of clients	Percentage of total
Physical:		
Beatings	64	93
Overcrowding or isolation	63	91
Inadequate toilet facilities	63	91
Lack of medical care	63	91
Forced standing, lying or suspension	38	55
Burning (boiling water, chemicals, cigarettes, electricity)	24	35
Falanga (blows to the feet)	16	38
Asphyxiation (water, hood, other substance)	12	17
Blows to ears	16	23
Use of insects or animals	1	
Sexual assault	8	12

Symptoms	Number of clients	Percentage of total
Psychological:		
Mock executions, threats of death, forced to watch others killed or tortured, humiliation	63	91
Inadequate food, sleep, exercise	62	90
Pharmacological:		
Use of drugs	7	17

SYMPTOMS

PHYSICAL: Headaches, Joint pain, back pain, auditory difficulties, dental problems, gastrointestinal problems, scars, visual handicap.

PSYCHOLOGICAL: Severe nightmares, insomnia, irritability, panic, appetite disturbances, anxiety, intrusive reexperiencing of the event, hyperalert, alienation, depression.

COGNITIVE: Loss of concentration and short-term memory, confusion.

Presently receiving assessment, long-term intervention, social work services, medical services or support counselling: 21 persons during this month (Intake/Assessment: 4 persons). Discharged: 0

The CHAIRMAN. I thank you very much, Mr. Weissbrodt.

I thank all of the witnesses for the succinctness and the merit of their presentations. At this time, I would like to submit an article on International Rehabilitation Center for torture victims in Copenhagen, Denmark.

[The information referred to follows:]

HEALING THE WOUNDS OF TORTURE

Psychiatrist Peter Vesti makes sure he neither dresses like a doctor nor talks like on to his patients. The hospital where he works does not look remotely like a clinic.

Vesti is on the staff of a unique hospital in a pleasant suburb of Copenhagen. Its title says it all—the International Rehabilitation Center for Torture Victims. Yet for the 200 patients who have managed to reach the center's two cheerfully decorated villas, the darker side of life is evident.

Doctors in white coats, sterile waiting rooms, and high-technology diagnostic equipment are taboo, says Vesti. The soft-voiced physician, who dresses as casually as a golfer, says that a conventional hospital atmosphere could trigger agonizing memories of other doctors who tortured patients or stood by while they were brutally interrogated, intervening only to patch them up so that they could be brutalized further.

All of the patients at the center bear the marks of physical and mental torture. Many have been tormented by electricity shot through their bodies, in their mouths, to their sexual organs. Many of the female patients were raped by their torturers.

When the center opened 6 years ago, most of its patients came from Chile, Argentina, and Uruguay. Today the majority are from Iran, Iraq, and Lebanon. The youngest victim whom the center has treated was 5. Like the names of almost all of the patients, his name is kept secret for fear of reprisals against his relatives.

The center's medical director, Dr. Inge Genefka, cautiously believes that some of the hard-won lessons at the center could be of benefit to the hostages in Beirut when they are finally freed. On gaining freedom, the reactions of hostages, suggests Genefka, are essentially little different from those of torture patients. They commonly display psychological problems such as irritability, anxiety, and memory lapses and have difficulty concentrating.

"Torture does not end with freedom," she says. "The aftereffects can be equally scarring. We constantly tell our patients that they would not be normal if they were not depressed, that no one comes out of a torture chamber happy. We try to convince them that being depressed is part of the road to recovery."

The psychiatrists and psychologists at the center use methods borrowed from those used to help survivors of the Nazi Holocaust, rape victims, and Vietnam veterans. Vesti explains the gist of the treatment: "We take great pains not to spark overwhelming memories in patients. On the other hand, we do encourage our patients to talk about their experiences, but at their own speed. This is a horrible job.

I get angry and sad when I get a few glimpses of what is going on in the world now."

The center receives an annual grant from the Danish government of $800,000, which covers half of the operating costs. The balance is made up by private contributions. Patients are not charged, but only those who have been granted the status of political refugees by Denmark are eligible for treatment. There is a waiting list of almost 150.

The center's medical team has taught its techniques around the world, sometimes secretly to health professionals in countries where torture is commonplace. Staff members have at times risked their lives to pass on their special knowledge.

Therapists at the center do not use the standard hospital equipment, because they could further traumatize patients who were frequently bound, wired, and electrically shocked. Instead, they rely on massage to relieve pain and to help patients. "Some patients refuse, at first, to take off their clothes," says Inge Bloch, a physiotherapist. "They know that stripping has been a prelude to pain. Others panic if they are touched suddenly or approached from behind."

Vesti carefully encourages his patients to relive the terror of their torture and vent emotions that they have had to bottle up. He encourages them to display fury at the humiliation of being tortured, to help expunge deep-seated feelings of guilt at having survived when others died.

He and his colleagues have come to understand the methodology of the torturers. "Contrary to a popular idea, torture is not used only to extract information," says Vesti. "It is also designed to break strong personalities. Ultimately, it is used to intimidate whole societies. The sight of what an experienced torturer can achieve can cow the strongest man or woman."

The center's staff believes that psychological torture is on the increase, because attacking the mind leaves no clear-cut evidence, unlike blows to the body. But after an average stay of 12 months, about 90 percent of the center's patients do return to normal lives—a tribute both to the mind's power to adapt and to the work of the center's staff.

The CHAIRMAN. I apologize for not being able to stay on. I will be submitting some questions in writing. I would ask that the record be kept open for at least a week so that any of my colleagues who have questions can present them, and that will be part of the written record.

I would now turn the gavel over to Senator Helms.

Senator HELMS [presiding]. I am going to submit questions to each of you myself. conclude in just a moment. This means that we will conclude in just a moment.

But I do have a couple of questions for Mr. Forte and Professor Rice.

If the reservations or understandings that both of you have proposed are fully adopted, would you then support this convention?

Mr. RICE. I think if the reservations that we have proposed were adopted as reservations, I think the treaty would accomplish much and it would be deprived of its harmful side effects. Yes, I would support it.

Senator HELMS. Mr. Forte.

Mr. FORTE. Absolutely, sir.

The United States policy in all human rights treaties should be to increase respect for human rights, to protect the American constitutional order and to prevent these treaties from being perverted in a political way against those who really need the benefit.

I think the reservations that we are suggesting do all those three things. If the staffs could refine them with the State Department, I think the treaty would become an effective aspect of international human rights.

Senator HELMS. Just to make a point, I would ask this question.

In our American legal system, does international law ever supersede domestic law?

Mr. RICE. Well, we have the treaty power, which makes treaties the supreme law of the land, subject to Reid against Covert, and you have a Court of Appeals decision saying that international law is part of the law of the United States.

It is something in my opinion to be wary of. It is something to be concerned about because the Constitution of the United States and the legislative processes therein prescribed are the proper way to make law for the United States.

I don't think we ought to make law by the treaty process.

Mr. FORTE. The short answer, Senator, and forgive me for oversimplifying it, is that international law is not a part of domestic law of the United States until it is codified through Congressional enactment, through acceptance of long-term "common law aspects" of court decisions, or it is accepted through the appropriate constitutional treaty-making power.

That is why if you are referring in an ancillary way to the proviso in the State Department's sanctions reservation—"provided that the sanctions are not otherwise prohibited by international law" that proviso strikes me as far too broad.

I think what the State Department meant was "provided that the sanctions do not otherwise constitute torture being within the context of the convention" not that someplace, somewhere else in international law could all of a sudden start changing our method of sanctions.

I think all that needs is a redraft. It is far too broad as currently phrased.

Senator HELMS. I am confining my questions to you two because the other, three witnesses have endorsed the treaty out of hand, and very eloquently, I might add.

Mr. WEISSBRODT. Although, Senator, I think that there are some things to say about the questions that you have asked. For example, on the issue having to do with lawful sanctions, when the United States was considering this issue in the U.N., it said the reference to lawful sanctions, in the second sentence of paragraph one of article 1, must be understood to mean sanctions which are lawful under both national and international law.

The reason the United States said that I think is because they were concerned about chopping of hands in places like Iran and Sudan. They were concerned that, essentially, if you did not have something like that, governments like Sudan or Iran or Saudi Arabia would chop off people's hands and say this is a lawful sanction under our law, and we don't want to see that from a U.S. perspective.

That is why we put the term "international law" into that understanding, and it is perfectly justified.

Mr. RICE. Senator, could I just make one comment there?

Senator HELMS. Sure.

Mr. RICE. I was pleased that Mr. Weissbrodt brought up before in this connection the "hooding" and other practices in Northern Ireland, which went to the European Court and were found to be cruel and inhuman punishment,, but not torture.

We have to keep in mind the paradox of this Convention on Torture being advanced by nations like China, the Soviet Union, Bulgaria, et cetera. We tend to regard the only potential malefactors here as the Communist nations or the Third World nations. We have a horrendous record of human rights violations in Northern Ireland, as you raised the question.

Article 3 would be implicated in the Joseph Daugherty case, where the Attorney General is trying to deport him and where there certainly is a well-founded fear of persecution.

So there are a lot of things to be concerned about here. Because it is something that is advanced by nations that do not themselves have a very promising track record on torture, we ought to be very careful about it. We ought to affirm clearly that we have an instrument, the Constitution of the United States, which is not going to be improved by anything these folks can suggest.

Senator HELMS. I have a couple of final questions, and if any of the rest of you have any comments, please do not hesitate to interject.

Without reservations or understandings, would the torture convention be self-executing?

Mr. FORTE. Parts of it would, yes. Parts of it would not.

Some of the parts call on states to pass legislation in implementation. Those parts are not self-executing.

Article 16, which would be the most dangerous article, would be self-executing, for there it says that each state party shall undertake to prevent in any territory acts of cruel, inhuman, or degrading treatment or punishment.

Now, if we have no self-executing clause and we do not limit article 16 to the 8th Amendment of the due process clause, the week after this convention is ratified, some lawyer who, with great magnanimity of heart, believes very much against capital punishment, will go to a court and ask the court to say that capital punishment is cruel, inhuman, and degrading treatment—and there is an argument for that—and he will say to the court you have jurisdiction because this is a self-executing clause and it is not limited by the 8th Amendment.

The 8th Amendment may allow capital punishment, but now we have a treaty and under the supremacy clause, that may require that you wipe out capital punishment.

But on the other side, let me tell you this, Senator. It says that each State Party shall prevent acts of cruel, inhuman, and degrading treatment when such acts are' committed at the instigation, or with the consent or acquiescence of a public official.

Now I am very strongly in the pro-live movement, and if the Senate, in its wisdom, decides to allow this treaty to pass without a limitation on article 16 and making it self-executing, the week after its passage, I'm going to court and I'm going to say that public hospitals that permit fetuses, unborn children, to be terminated in pain is cruel, inhuman, and degrading treatment.

Now I have a moral obligation to do that. But, speaking as a professor of constitutional law, I have to admit that the right way to solve that problem, as the capital punishment problem, like through the legislative process, through Congress and the states.

Mr. RICE. May I just make one comment on that, Senator?

I find it curious that I have not heard any Senator or anybody else take here the position I am personally opposed to torture but I do not want to impose my morality on others.

I think we ought to take a strong position against homicide, torture, et cetera.

Incidentally, on the non-self-executing thing, I have proposed that the declaration advanced by the transmittal and by the State Department be made a reservation. I think that ought to be made a reservation.

Senator HELMS. Gentlemen, thank you all. I am going to circulate copies of the statements by all of you because you are very thoughtful, you are very eloquent, and obviously you are very wise.

Thank you very much for helping the committee.

[Whereupon, at 11:50 am., the hearing was adjourned, to reconvene subject to the call of the Chair.]

APPENDIX

Letter From American Jewish Congress to Senator Pell

February 21, 1990.

The Hon. Claiborne Pell,
Chairman, Committee on Foreign Relations, U.S. Senate Washington, D.C. 20510

Dear Mr. Chairman: On behalf of the American Jewish Congress, and its 50,000 members nationwide, I am writing to urge you to recommend that the United States ratify the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture).

Jewish values and traditions teach that every human being is imbued with worth and dignity. There can never be any justification for torture, for stripping individuals of their fundamental human dignity. This is why we need basic international protections against the use of torture by governments.

The Convention Against Torture provides these basic protections. It was adopted unanimously by the United Nations in December 1984, and was implemented in 1987. While the United States played a leadership role in the drafting of the Convention, it is the only member nation of the United Nations Security Council which has not ratified this important international agreement.

The Convention provides a definition of torture so that torturers are not able to claim ignorance of the fact that their actions constitute torture. Additionally, the Convention mandates a procedure for punishing those governments which are guilty of torture. We hope that you will support the Convention Against Torture, and that you oppose reservations, declarations, or understandings which would unnecessarily weaken these and other important provisions in the Convention.

I respectfully request that this letter be made part of the hearing record.

Thank you for your consideration.

Sincerely,

Robert K. Lifton,
President.

Prepared Statement of Monsignor Robert N. Lynch, General Secretary, U.S. Catholic Conference

The U.S. Catholic Conference supports ratification of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or punishment. In our judgment, this convention is a sound instrument that can contribute to actualizing the ideals of the United Nations Declaration of Human Rights.

Fortunately, there is widespread agreement that torture and similar gross violations of human rights are morally repugnant. In the words of the Second Vatican Council, they are "infamies" that "poison human society (and) * * * are a supreme dishonor to the Creator." While most nations of the world have joined the United States in condemning torture or extra judicial killings in principle, in practice, according to Amnesty International, more than one-third of the world's governments engage in, tolerate, or condone such acts.

In Catholic moral teaching, infringements of fundamental human rights, particularly those as serious as torture, must be combated not just by moral persuasion but also by practical action, including effective national and international legal mechanisms. The torture convention not only helps solidify a world-wide consensus that torture must be eradicated but, more importantly, it takes a critical step in the process of developing and strengthening an international standard of conduct for governments, and in providing mechanisms for monitoring and responding to instances of torture. Ratification of the convention by the United States, which played a major role in drafting it, would help institutionalize and concretize its leadership role in combating the abhorrent practices covered by the convention. It would be

one more indication that in this increasingly interdependent world the United States is committed to expanding the role of multilateral structures in protecting and promoting human rights.

Given the importance of expanding the role of such multilateral structures, we hope that in considering reservations, declarations and understandings every effort is made to ensure that the final instrument of ratification reflects a substantive, not merely symbolic, commitment of the United States to work within the international community to eliminate torture.

In sum, the USCC supports ratification of the torture convention because it offers the United States an opportunity to play a leadership role in establishing, expanding and strengthening the kinds of international structures that are necessary to ensure world-wide protection of fundamental human rights.

Prepared Statement of Houston Putnam Lowry, Esq., Connecticut Bar Association

I am the Chairman of the Connecticut Bar Association's section of international law and world peace. I expressed our section's support for the ratification by the United States of the so called "Torture" Convention. We understand that the public hearing on this Convention was rescheduled for January 30, 1990 before the Senate Foreign Relations Committee.

We wish to reaffirm our support for ratification by the United States and to respectfully urge you to support ratification of this Convention without reservation.

Of greatest concern to the section is the administration' proposed reservation to article 16 of the Convention, which reads as follows: The United States considers itself bound by the obligation under article 16 to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of United States.

Article 16 simply places on the Federal Government the obligation to train law enforcement and medical personnel in the prevention of cruel, inhuman or degrading treatment or punishment as that prohibition is and has been construed by authoritative international tribunals. We do not believe that such an obligation is an onerous one, especially for a nation espousing respect for the rule of law in international law and human rights. While we recognize this is a slightly higher standard than the Constitution requires, we believe the Constitution is a minimum, not a maximum, standard of treatment.

Other organizations actively support ratification of this important human rights Convention without this reservation, including the American Bar Association and Amnesty International.

Ratification without this and the other two proposed reservations (concerning the need for implementing legislation and the refusal of the United States to be bound by article 30's international arbitration procedure) as well as the "non-selfexecuting" declaration, would only serve to provide additional protection for people in the United States against unlawful violence under color of lawful authority. After all, the United States played an active role in drafting the Convention and lobbied other United Nation members to adopt it. The United States credibility in promoting international human rights will be called into question if it does not follow up on its initiatives and ratify the Convention without reservation.

The United States has very little to fear from ratification without reservation because its record is excellent on torture and ill-treatment. To the extent that violations do occur, the United States should be willing to address those few violations as a reasonable price for demonstrating to the world community our Nation's commitment to the equal application of international human rights norms. The rule of law is our only protection against torture and other ill-treatment.

The Connecticut Bar Association's section of international law and world peace respectfully requests this letter be included as part of the record of the Senate Foreign Relations Committee's hearing scheduled for January 30, 1990.

Prepared Statement of Peter-Frederico A. Burns-O'Brien

Mr. Chairman: Let me urge you and your committee to endorse the concepts contained within the confines of the Convention on Torture. Never is there an excuse for individuals on behalf of governments to use torture regardless of other intentions. I am only familiar with the use of torture by one nation, the United Kingdom,

which has been torturing Irish People for the past 20 years by a policy of state terrorism. I submit to you evidence of the British campaign of torture and murder against the Irish people for inclusion in your committee report. Many of your colleagues have spoken out against British abuse and this is commendable and I would like to thank Senator Orrin Hatch of Utah who has been very vocal in his concern with the basic human and constitutional rights of the Irish people in Ireland, England and the United States. I have had the honor of acting as Senator Hatch's Irish advisor for the past seven years and know his commitment.

For the past 20 years, the British government has pursued a policy of murder, torture and other inhuman and degrading treatment. Prime Minister Margaret Thatcher has now admitted that the British government's MI 5 and MI 6 engaged in a "dirty tricks" campaign in the early seventies. These intelligence groups as well as the elite Strategic Air Services (SAS) were responsible for assassinations and the systematic torture of Irish People.

The state terrorism of the British is unparralled in any nation that calls itself free and democratic. The torture convention before you must be particularly aimed at the British. Ninety to ninety-five percent of those presently incarcerated in Prisons in Northern Ireland and in England, that is, Irishmen and Irishwomen, were tortured to obtain confessions and these confessions along with sworn statements of government paid informers, paid to lie, were used as convicting evidence. The courts in Northern Ireland are non jury courts where a government judge is appointed to operate the British conveyor belt of injustice.

In 1976, Britain was cited for torture by the European Commission on Human Rights and convicted of cruel and degrading treatment of Irish people in 1978. Does it continue? The British Secretary of State for Defense stated recently about the dirty tricks campaign: "it is still used in Ulster (Northern Ireland) where it is necessary to protect lives and for sound and absolutely honourable reasons." If murder, torture and a campaign of lies are for honourable reasons, what are the dishonourable ones.

The case against the United Kingdom and their campaign of murder as well as physical and psychological torture of Irish civilians is overwhelming and substantiated by evidence. The tragedy is that it is on going and the United States has remained deathly silent accepting publicly Britain's denials and thereby participating in the cover up of atrocity. At least the condemn nation of torture through the convention is a start. As part of this written testimony, let me offer the committee a synopsis of the British "dirty tricks" campaign and chapter 5 of a book by two English people who set out the British state terrorism which is the root cause of the problem in Ireland.

THE BRITISH CAMPAIGN OF DIRTY TRICKS (MURDER, TORTURE AND DISINFORMATION)

British Intelligence and Conservative M.P. Airey Neave were the architects.

1. They published lies about alleged Irish terrorists.
2. They published lies about Labour Prime Minister Harold Wilson.
3. They published lies about Conservative Leader, Edward Heath
4. They published lies about prominent Irish Americans, Fr. Sean McManus, Frederico P. Burns-O'Brien, Congressman Mario Biaggi and others. The result of the campaign put Thatcher in as Tory leader in 1975 and as Prime Minister in 1979 with Neave as her top advisor. All this was done with the knowledge of the CIA.
5. British security forces murdered and abused Irish People (almost all Catholics) in Northern Ireland and Southern Ireland to instill fear and terror in the population generally. In November 1989, an American citizen, Liam Ryan was murdered by surrogate agents of the British security forces extending the terror to Americans.
6. The British security forces torture suspects on the street in random searches and in custody. Fred Holroyd, former British military intelligence officer in Northern Ireland served as liaison between military intelligence, MI 6, the RUC local police and the SAS elite units. He has confirmed the dirty tricks campaign; he participated in it. Also, Colin Wallace, civilian press officer of the Ministry of Defense, confirmed 35 assassinations by security forces in the first 6 months of 1976 alone. British Police Superintendent, John Stalker, investigated a "shoot to kill" policy and confirmed it as well. All was denied by Thatcher in May 1987, but more recent revelations forced her to recant and in a letter to the House of Commons, January 30, 1990 she had to admit lying.

The ongoing murders by British security forces leave little hope that their policy of State Terrorism will end soon until the torture and murder campaigns are given public exposure. On January 13, 1990, three alleged suspects were pursued by plain clothes SAS soldiers and shot without warning then, according to eye witnesses they

were shot as they lay dying on the ground. Three other SAS murders in 1989 were similarly carried out. In many cases, murders carried out by the British security forces are preceded by beatings and torture of the victims.

The British who are self righteous and quick to condemn need only look in the mirror to find the greatest torturers of the second half of the 20th Century. The United States must be the loudest in condemnation of the British if they are to look in the mirror and not see a two faced hypocrite. So many individual leaders in the U.S. have had the courage to condemn British atrocities, it is time the government did so. The Torture Convention is a step in the right direction.

PREPARED STATEMENT OF THE FEDERAL BAR ASSOCIATION (INTERNATIONAL LAW SECTION)

The Federal Bar Association International Law Section strongly supports the advice and consent by the U.S. Senate to ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture).

This treaty, which the United States has signed, represents an important step forward in the development of international standards against torture.

The Convention makes it legitimate for a nation to be concerned and to intercede regarding the behavior of another country toward its citizens. The Convention reinforces the definition of torture so that torturers may no longer claim that they were unaware of the meaning of torture.

The United States played a major role in drafting the treaty. It should complete the process by ratifying the Convention. It is the only permanent member of the U.N. Security Council which has not ratified the Convention.

The United States publicly proclaims support for human rights. The longer it waits to ratify the treaty, the more its credibility as a human rights leader is eroded. Ratification is vital in proving the U.S. commitment to human rights as a concern that crosses national boundaries.

PREPARED STATEMENT OF HUMAN RIGHTS ADVOCATES

MR. CHAIRMAN: Human Rights Advocates is a California-based, public interest, non-profit organization that works to promote human rights through the use of international law. HRA has provided information to congressional offices on a variety of human rights initiatives, and filed interventions with U.N. human rights bodies in Geneva and New York. HRA members participated in the drafting of U.N. instruments condemning torture and continue to work for greater compliance. We are pleased to join various colleagues in submitting testimony urging ratification of the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and commend the Foreign Relations Committee for convening hearings on this pressing and important issue.

HRA strongly support U.S. ratification of the Torture Convention but equally strongly opposes all of the reservations the administration has proposed that the Senate attach to its advice and consent to ratification. We are concerned that the administration has recommended a number of reservations with the aim of assuring that ratification will require only minimal changes in U.S. law.

That attitude sends a disturbing signal to other governments and is sure to be cited by some as justification for their own acceptance of the treaty subject to conditions that would minimize domestic relevance. While we are pleased that the administration recommends participation in the committee established to monitor compliance with the treaty, the proposed reservations would have the effect of shielding the U.S. from scrutiny. If the U.S. is to achieve credibility in its commitment to human rights it must be willing to be held to the same standards as other participating governments.

We are particularly distressed by the reservation to article 16 whereby the U.S. proposes to limit the meaning of "cruel, inhuman or degrading treatment or punishment" to the U.S. understanding of treatment or punishment by the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution.

The State Department's objections to article 16 focus on two points: (1) the European Court of Human Rights' ruling in the *Soering* case that death row conditions in certain circumstances could violate the European prohibition of inhuman and degrading treatment, and (2) the vagueness of the phrase "degrading treatment."

We believe that both those concerns can be addressed adequately through the deliberations of the committee against torture. In any event, to the extent that the

U.S. is adamant about shielding itself from inquiry into those two areas, far less onerous understandings would suffice.

First, regarding death row conditions, the U.S. has proposed an express understanding that it "does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with * * * the Constitution . . ." That understanding is adequate to protect the U.S. from scrutiny concerning imposition of the death penalty.

Second, while the contours of the prohibition of "degrading treatment" may be vague, considerable consensus exists concerning the reach of the prohibition of "cruel or inhuman treatment or punishment." "Cruel or inhuman" specifies treatment that causes significant and unnecessary physical or mental injury, whereas degrading treatment does not require injury. The State Department legal adviser, is his statement to the Foreign Relations Committee, acknowledged the administration's expectation "that our Constitution would prohibit most (if not all) of the practices covered in Article 16 . . ." Thus, to allay administration concerns, a reservation limiting U.S. obligations under article 16 to those pertaining to "cruel or inhuman treatment or punishment" should suffice.

Our proposed understanding would reflect a more sophisticated approach to the prohibition of "cruel, inhuman or degrading treatment or punishment" than that suggested by the administration's current proposed reservation. That reservation refers to the *term* "cruel, inhuman or degrading treatment or punishment." In fact the prohibition is not a single term but one whose prohibitions are severable and have been separately analyzed and construed.

Moreover, our proposed understanding would have a modest yet noteworthy impact on U.S. practice. The prohibition of cruel or inhuman treatment or punishment currently overlaps significantly and perhaps entirely, as noted above, with U.S. Constitutional requirements. The treaty does not require criminalization of the infliction of cruel or human treatment or punishment, but only its prevention through such means as education of law enforcement, military, and publicly employed medical personnel.

The international effect of modifying the proposed article 16 reservation, however, would be significant. It would demonstrate U.S. willingness to be held to the same general standards as the rest of the states parties and to improve U.S. treatment in areas other than the death penalty to the extent that the international standard evolves to be more protective of rights than are the Fifth, Eighth and Fourteenth Amendments; it would contribute to development of the prohibition of "cruel or inhuman treatment;" and it would make more credible U.S. complaints concerning conduct that a criticized government arguably could claim falls on the borderline between torture and cruel or inhuman treatment or punishment.

Torture, as internationally understood, clearly is prohibited by the U.S. Constitution, and criminal and civil penalties already are provided in U.S. law. If the Torture Convention is to have any impact on U.S. law—other than making a few minor adjustments regarding extradition, deportation, and international cooperation in criminal prosecutions—the U.S. must stand willing to accept the primary obligations imposed by article 16.

Accordingly, we strongly urge the Senate to give its advice and consent to ratification without any reservations and, in particular, without any reservations concerning article 16; at most, and understanding concerning degrading treatment should suffice to assuage administration concerns.

PREPARED STATEMENT OF FRANK C. NEWMAN, (RETIRED JUSTICE), SUPREME COURT OF CALIFORNIA

U.S. RESPONSE TO THE U.N. "TORTURE TREATY"

In 1948 the Universal Declaration of Human Rights, coauthored by Eleanor Roosevelt and other U.S.and U.N. experts, pronounced that "No one shall be subjected to the torture or to cruel, inhuman or degrading treatment or punishment." That sentence is reiterated in the International Covenant on Civil and Political Rights, which has been in effect since 1976, which President Carter endorsed in 1977, but to which our Senate not yet has given advice and consent (even though most nations of the world have ratified the treaty).

As to many clauses of the Universal Declaration and the Covenant, experts sometimes conclude that implementation and interpretation are needed. Thus the U.N. Treaty on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was drafted and has been in effect since 1987. As an editorial this year in the

New York Times noted (on February 16) 41 nations already have ratified the Treaty. (And now there are more than 41).

President Reagan endorsed the Torture Treaty, and on January 30 this year Senator Pell and three Republican members of the Foreign Relations Committee heard testimony. Testifying for the U.S. were the legal advisor of the State Department and the deputy assistant attorney general of the Justice Department's criminal division.

The New York Times editorial states, "Creditably, the Bush administration has scrapped some disabling reservations * * * and favors ratification with only a few important changes." But what changes are important? I fear that whoever approved that editorial was or were not informed as to what has *not* been "scrapped." I suggest that the Torture Treaty will be shredded if several changes now proposed by the White House are not rejected by the U.S. Senate.

To illustrate: Though the Times seems to approve the making of "cruel, inhuman or degrading treatment a criminal offense," completely ignored is the fact that the White House (now in a "reservation" and not merely a Reagan "understanding") wants the phrase to include only those offenses proscribed by the 5th, 8th, and 14th Amendments to the U.S. Constitution. Indisputable is the fact that offenses covered by the those three amendments shockingly have less coverage than do the U.N. proscriptions. Further, seven of President Reagan's "disabling reservations" have been retained without modification; and President Bush's scrapings indeed are minimal (e.g., "to clarify the definition of mental harm").

Is it too much to ask that the staff of the Times will guide us with more than "a 30-second soundbite" analysis?

PREPARED STATEMENT OF HUMAN RIGHTS WATCH

For most Americans torture is a subject Ear removed from personal experience. But for people in too many other countries, torture is part of reality. It is used as a weapon to intimidate, coerce, or punish political opponents, and often infests the criminal justice system. Torture not only causes severe physical and/or mental pain or suffering when it occurs; the physical and psychological aftereffects of torture can last a lifetime. As Richard Schifter, then Alternate U.S. Representative to the 39th Session of the United Nations General Assembly, proclaimed on December 10, 1984 when the nations of the world unanimously adopted the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: "One of the most flagrant continuing violations of human rights is torture—a crude violation of everything that we understand by the word "human." As long as torture persists, further steps are needed to translate our words into actions to eliminate this abhorrent practice."

Human Rights Watch welcomes the decision of the Senate Foreign Relations Committee to hold hearings on the Convention Against Torture. We urge the Senate to give its prompt advice and consent to ratification of the treaty without reservations, declarations, or understandings that dilute its provisions or reduce its domestic impact. Failure to do so will decrease US influence to eliminate the scourge of torture worldwide. It could also mar the effectiveness of U.S.-based non-governmental human rights monitoring organizations, like Human Rights Watch. These groups would be in a weak position to respond to charges, made by governments whose human rights practices they are reporting, that their own country has refused to adopt international norms prohibiting and punishing torture.

While the Congress, this administration, and all recent administrations have made statements and passed resolutions assailing torture, the U.S. has yet to ratify a single international human rights treaty banning torture. This recalcitrance sends a message to other countries that U.S. abhorrence of torture is rhetorical rather than an unwavering element of foreign policy. It provides nations that engage in torture with a role model to follow when they refuse to be bound by international norms prohibiting torture. And it deprives all people who face the threat of torture of the protections that a powerful ally against such abuse can provide.

Of all the international treaties that condemn torture, the Convention Against Torture goes furthest in setting forth practical steps governments must take to protect individuals. These include making torture a criminal offense, and training civil and military law enforcement personnel, medical personnel, and public officials about the prohibition against torture. The treaty establishes an independent international committee to monitor compliance with the treaty and, if a nation so agrees, to investigate inter-state and individual complaints. It also requires nations to

ensure that torture victims have an enforceable right to compensation and the means for as full rehabilitation as possible.

In addition, the treaty makes torture a universal crime over which all nations have jurisdiction. Countries that ratify the treaty are required to arrest suspected torturers found within their territory and prosecute and punish them, or extradite them to another country that will. It also requires that nations assist each other in criminal proceedings against torturers.

That other nations regard these provisions as crucial safeguards against torture is evidenced by the number of ratifications the treaty has received. In the five years since the treaty was opened for signature, fifty countries have ratified it. These include the Soviet Union, most European countries, Canada, and Mexico. Indeed, the United States is the only permanent member of the United Nations Security Council that has not ratified the treaty.

The U.S. has little reason to fear international scrutiny of its laws or practices with respect to torture. While not perfect, the U.S. record in this area is good. Allowing international scrutiny of its record with respect to torture would demonstrate this nation's impartial commitment to human rights and would substantially increase U.S. authority to demand that other countries put an end to torture.

Ratification of the treaty would also show this nation's respect for international law. U.S. officials voiced strong support for the creation of the treaty and U.S. representatives participated in all sessions of the Open-Ended Working Group of the United Nations Human Rights Commission that was charged with drafting it. It would appear impudent for a nation that was so actively involved in the treaty drafting process to disregard the final outcome as if it were above the need to be subject to the international norms the treaty establishes.

Indeed the treaty offers U.S. citizens and residents protections against torture and cruel, inhuman or degrading treatment or punishment that they have every right to expect. Moreover, it assures them that future generations will live in a nation free of the terror and agony of torture; future U.S. administrations will be subject to a continuing international law obligation not to allow torture to occur.

Prompt ratification would enable the U.S. to play a central role in the process by which the treaty is interpreted and implemented. It would ensure a U.S. voice in selecting members of the Committee Against Torture who will monitor compliance with the treaty. This nation ought to be involved actively in the important early stages of treaty implementation so that U.S. concerns are taken into account.

The importance of unencumbered ratification of this treaty bears reemphasizing. Treaties govern relations between the nations that are party to them. While they have important domestic import, their primary function lies in the international plain. In the case of human rights treaties, they are the means by which nations affirm to one another their solemn commitment to promote and protect human rights both within and beyond national frontiers. Because nations of many diverse political and legal traditions will become party to them, their language is often less specific than any particular government would like. It is for that reason that treaties like the Convention Against Torture include mechanisms for interpreting the treaty and for resolving disputes regarding interpretation that may arise between parties.

For the implementation process to be genuinely fair and impartial, all nations must accept and work within these limitations. The Committee Against Torture would face daunting obstacles to implementing the treaty if every nation insisted on redrafting the treaty's provisions to ensure that all relevant domestic law considerations were etched into its treaty obligations.

The package of reservations, understandings, and declarations submitted by the Bush administration demonstrates an almost paranoid fear that interpretation and implementation of the treaty at the international level will be unfair. While accepting the competence of the Committee Against Torture, several reservations and understandings undermine the Committee's ability to implement the treaty with respect to the U.S. by limiting interpretations of Convention provisions to those acceptable to the U.S.

Most troubling are those reservations that relate to the definition of torture. article 1 of the Convention defines torture as: * * * any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other

person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The administration has offered a reservation that limits the definition of severe mental pain or suffering to four types of conduct: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, or severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

This definition does not cover many types of psychological torture used around the world. For example, under the military dictatorship in Uruguay in the 1970's and early 1980's, political prisoners in Libertad Prison were subjected to constantly fluctuating prison rules, but were not informed of rule changes in advance. Punishment for even minor rule infractions, such as speaking during silent periods or failing to be suppliant before prison guards, was swift and severe. Many prisoners were subjected to years of such psychological torture and have suffered permanent psychological after effects as a result. Elsewhere prolonged periods of solitary confinement or sensory deprivation are used as a form of torture. In other countries persons detained incommunicado are mentally tortured with threats that their families will not be informed of their whereabouts until they "confess." The fear that a loved one has "disappeared" causes intense mental pain and suffering for family members, yet threats of severe mental pain and suffering to others are not included in the proposed reservation.

In his testimony, Deputy Assistant Attorney General Mark Richard erroneously asserts, when explaining why the administration seeks to limit the range of conduct that constitutes mental torture, that "mental suffering is often transitory, causing no lasting harm." Whether torture is physical or psychological, its purpose is to cause severe mental suffering. All forms of torture dehumanize victims and render them helpless and dependent on those who seek to harm them. victims who comply with the demands of their torturers do so because they are terrified of what will happen if they refuse. Contrary to Mr. Richard's statement, it is the physical injuries produced by torture that are most likely to heal. As the literature on concentration camp survivors underscores, mental suffering is much more pervasive and likely to persist. Recent studies of survivors of torture indicate that nearly all suffer from some or all of the criteria for the psychiatric diagnosis of Post-Traumatic Stress Disorder, as well as other psychological problems such as depression or psychosomatic complaints, years after their torture has ceased.

In addition to failing to recognize the serious psychological impact of torture, the administration's mental suffering reservation is short-sighted. The range of acts that constitute torture is limited only by the imaginations of those who seek to perpetrate them. In recent years governments that practice torture increasingly have sought to devise methods that cause intense pain but leave no marks. The era of psychological torture appears to be ahead of us. It would be a mistake for the U.S. to interfere with the Committee Against Torture's ability to respond effectively to these new and ever more cruel torture techniques.

A second understanding proposed by the administration would restrict the definition of torture to acts directed against persons in the offender's custody or physical control. Again, this understanding would unnecessarily limit the ability of the Committee Against Torture to interpret and implement the treaty. In 1986 soldiers in Chile threw gasoline and then a lighted match onto two teenagers who were participating in a demonstration. One died; the other was severely burned. There is little doubt that if faced with a comparable case the Committee Against Torture would find that such conduct constitutes torture. Yet the administration's "custody or physical control" understanding would seem to deprive it of that authority with respect to future acts by U.S. police or military officials. It would also weaken the moral authority of the U.S. to condemn such behavior by other governments.

The vague wording of this proposed understanding also raises concern that high level government officials whose junior officers engaged in acts of torture could not be held responsible for those acts because they never had custody or physical control over the victim. A proposed understanding defining the term "acquiescence" in the Convention's definition of torture heightens those concerns. Under that proposed understanding, "the term "acquiescence" requires that the public official, prior to the activity constituting torture, have awareness of such activity and there-

after breach his legal responsibility to intervene to prevent such activity." While the administration has clarified that both actual knowledge and willful blindness fall within the meaning of 'acquiescence,' negligent failure to be informed about and prevent acts of torture by junior officers is not covered. These two proposed understandings, especially when read together, suggest that the administration seeks to create a shield to protect high-ranking officials from accusations of torture.

The administration's proposed reservation to article 16 which prohibits cruel, inhuman or degrading treatment or punishment,' also unreasonably ties the hands of the Committee Against Torture. Under this proposed reservation the U.S. would be bound by the obligation to prevent cruel, inhuman or degrading treatment or punishment only to the extent that such acts are prohibited by the 5th, 8th, and/or 14th amendments of the U.S. Constitution. By linking U.S. compliance with the treaty to shifting interpretations of U.S. constitutional law, this reservation unnecessarily burdens the Committee Against Torture, whose members would be forced to become U.S. Constitutional law experts to monitor U.S. compliance under the treaty. Should other nations follow suit and similarly link their international obligations to their own domestic law, as the proposed U.S. reservation implicitly invites them to do, the committee's task would become unmanageable.

The proposed reservation to opt out of article 30 is another example of the administration's mistrust about how the treaty will be administered at the international level. article 30 provides that if two or more States are in dispute as to the interpretation or application of the treaty and those states cannot agree on an organization of arbitration, any state involved may refer the dispute to the International Court of Justice. The proposed reservation represents a further retreat from participation in an international system for the peaceful resolution of inter-state disputes. It comes at a time when other states, in particular the U.S.S.R., are withdrawing similar reservations in favor of strengthening international dispute resolution mechanisms when those disputes involve allegations of torture.

One unique feature of human rights treaties, and of the Convention Against Torture in particular, is that the beneficiaries of the rights guaranteed are the individuals who populate the nations of the world, not the nations themselves. The Convention Against Torture will have little meaning if states refuse to give it domestic import by allowing their citizens to rely upon it to seek either domestic or international implementation or recourse. Yet the package of reservations, declarations, and understandings recommended by the administration would have precisely this effect.

For example, the administration has proposed a declaration that would make the provisions of articles 1 through 16 of the Convention non-self-executing. This declaration seeks to deny domestic legal remedies to individuals who seek relief for violations of the treaty in U.S. courts, unless legislation is adopted specifically granting to such individuals the right to seek legal redress. While some of the first 16 articles of the treaty are drafted using general language that could not be easily enforced with direct judicial action, other provisions, like the article 3 prohibition against returning or extraditing any person to a country where there are substantial grounds for believing that he or she would be tortured, are specific and could be enforced by a court. The non-self-executing provision thus not only denies to individuals an effective means of seeking relief should violations occur, but also deprives U.S. courts of an important separation of powers role in ensuring U.S. compliance with the treaty.

A proposed understanding to article 14, which provides that States must ensure in their legal systems that victims of torture have a means of obtaining redress and an enforceable right to fair and adequate compensation, further seeks to undermine the role of the courts in enforcing the treaty. The proposed understanding would limit article 14 by requiring States "to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State party." In the case of the U.S., this understanding could immunize the U.S. from civil liability for acts of torture undertaken by its agents in territory that was not under U.S. jurisdiction. Clearly this is not the intent of article 14. In addition, in a statement in its May 12, 1989 Letter of Submittal, the State Department suggests that article 14 does not compel U.S. courts to open their doors to civil actions for redress of acts of torture that occurred outside the United States. While the State Department's comment is neither a reservation nor understanding and therefore not a proposed binding qualification to the treaty, it flies in the face of a series of federal district and appellate court decisions that have upheld the rights of individuals to bring civil actions in U.S. courts for torture that occurred abroad. This comment is unnecessary and should be withdrawn.

Another way the administration seeks to limit avenues of redress for treaty violations is by declaring that the U.S. will not be bound by the provisions of article 22 which recognizes the competence of the committee Against Torture to receive complaints submitted by individuals. The Committee Against Torture's authority to investigate individual complaints of torture closely parallels that of the Human Rights Committee established under the International Covenant on Civil and Political Rights. Under an Optional Protocol to that Convention, States may permit individuals to file individual complaints regarding human rights abuses that the Committee then investigates and follows up with the government involved. This individual complaint mechanism is arguably the most important and most effective role of the Human Rights Committee which has now received some 371 individual complaints. It is reasonable to assume that, like its counterpart, the Committee Against Torture will be an effective mechanism for investigating individual complaints of torture and ensuring appropriate redress.

The combined effect of the non-self-executing declaration, and the articles 14 and 22 understandings is to deny U.S. citizens and others who allege that they have been tortured any means of having their grievances heard or resolved. This position substantially weakens the effectiveness of the treaty in establishing comprehensive enforcement mechanisms for combating torture, at least where the U.S. is concerned. While this may seem of little consequence at the moment, recent rapid changes in world events serve as reminders that current conditions can change overnight. We leave our children vulnerable to abuses by future governments when we deny to them the full range of protections envisioned by the treaty.

The Bush administration has proposed other reservations and understandings, including a proposed Federal-State reservation, a proposed understanding to the article 3 non-refoulement provision, some additional understandings to the article 1 definition of torture, and an understanding that the death penalty, including any constitutional period of confinement prior to its imposition, does not violate the treaty. The arguments against these reservations and understandings, with which we agree, are eloquently made by other non-governmental organizations that have submitted testimony before this committee. We strongly urge that all of the proposed reservations, understandings, and declarations submitted by the administration that lessen the full force of the treaty as it applies to the U.S. be dropped, and that the Senate give its immediate advice and consent in favor of ratification of the treaty.

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THE POLITICAL ECONOMY
OF
NORTHERN IRELAND

by
Bob Rowthorn and Naomi Wayne

5 Casualties of War

The conflict now in progress in Northern Ireland has brought in its train immense social, economic and political costs. These costs have been felt both within the province and within neighbouring countries.

As we shall see in following chapters, the conflict has done great damage to the industrial base of Northern Ireland. Indeed, it is the most important single factor preventing a sustained economic recovery in the province. Meanwhile the total monetary cost to Britain of running the war and supporting the enfeebled economy of the North is approaching £2,000 million a year. In proportionate terms the burden to the Republic of Ireland is still greater: it now devotes over a quarter of its total budget to policing the border and controlling the activities of Republican paramilitaries.

The cost of the conflict has also been great in terms of life and limb. Since 1969 there have been over 2,500 deaths and 26,000 people injured, many very seriously. Acceptable standards of civil rights and liberties have also fallen victim. Within Northern Ireland civil liberties have been severely curtailed. The police and the army have almost unlimited powers to search, arrest and detain whoever they choose. Thousands of actual or alleged paramilitaries have been imprisoned for long periods of time, some for life, and tens of thousands have been detained for interrogation. No-jury courts, media censorship and mistreatment of suspects have all become commonplace. All of this has left a legacy of bitterness that could last for generations.

In this chapter we present a brief survey of the impact that the conflict has had in human terms on people within Northern Ireland and in mainland Britain. The bulk of investigation into this area has been carried out by the Cobden Trust and the National Council for Civil Liberties, and by a very few determined journalists and researchers.

We draw heavily on their original work, details of which are given in our bibliography. We also include a very brief account of the effect which the conflict has had on civil liberties in the Republic of Ireland.

Emergency legislation

From its birth Northern Ireland has been in a state of more or less continuous emergency. Special laws, harsh policing methods and, on occasion, the British army, have all been used to suppress opposition to the regime. Many civil liberties taken for granted in Britain and other West European countries have always been severely restricted in the province. Nowadays they are virtually absent. Legal constraints on the police and the army are minimal - insofar as these forces are held in check, it is more by political than by any legal considerations.

Alongside its effect on civil liberties within Northern Ireland, the conflict has external ramifications. In Britain, special emergency laws have been enacted giving the police new arbitrary powers of arrest and detention; censorship of television and radio has been extended; and some of the harsh policing methods used in Northern Ireland have been imported for use in mainland trouble spots. An even greater erosion of civil liberties has occurred in the Republic of Ireland, where there is a whole panoply of special courts, special laws and censorship designed to isolate and destroy the IRA.

We begin by considering the situation within Northern Ireland itself, which is governed by two main emergency laws: the Emergency Provisions Act (EPA) and the Prevention of Terrorism Act (PTA). The former was first passed in 1973 and was designed to replace the old Special Powers Act, which had been in continuous operation since the foundation of the Northern Ireland state (see chapter 3). It applies only to Northern Ireland. By contrast, the PTA, which was originally passed following the Birmingham pub bombings in 1974, applies throughout the UK and is frequently used in mainland Britain.

Though stated to be temporary measures (they have to be regularly renewed by vote of Parliament), both Acts have been consistently updated in less-pressured circumstances. The current law is to be found in the 1978 EPA and the 1984 PTA. Effectively they are now here for good. Renewal debates in Parliament are generally brief and ill-attended formalities, and most people have completely forgotten the supposedly temporary and emergency nature of these laws. In 1988 the Government announced that the PTA would be made permanent.

The Prevention of Terrorism Act

The PTA gives the police the power to stop, search and detain, without warrant, anywhere in the UK, anyone suspected of involvement in 'terrorist' activities. It also gives examining officials at ports of entry into the UK extensive powers to detain and interrogate travellers. Included is the power to detain people who are *not* suspected of involvement in 'terrorist' activities, so long as the officials concerned believe it *may* be useful to question them. In effect, this means that officials at UK ports of entry can legally arrest anyone they wish.

Once arrested, a detained person can be held by the police for up to 48 hours, and then for up to five more days with the permission of the secretary of state. During this whole period a detained person need not be charged with any offence or brought before a court.

Another power which is especially important in Britain is that of exclusion. Under the PTA the secretary of state can issue an executive order excluding a person of Northern Ireland origin from mainland Britain. The scope of the secretary of state's discretion here is extraordinary. Anyone who has been ordinarily resident in Great Britain for less than three years can be served with an exclusion order. While there is a notional right to appeal, the actual appeal procedure renders this right almost worthless. A person subject to an exclusion order has no entitlement to legal representation; no right to know the reason for the exclusion; and no right to know or to challenge the evidence on which the decision to exclude is supposedly based. Moreover, the appeal is considered informally by a government adviser whose decision is final and cannot be challenged in the courts.

Over the period 1974-84 some 245 people were removed from mainland Britain to Northern Ireland under the PTA, while a few people were transferred in the opposite direction. The exclusion powers contained within the PTA constitute, in effect, a form of internal banishment. Their existence is an implicit recognition that Northern Ireland really is a separate country from the rest of the United Kingdom.

The Emergency Provisions Act

Whilst the PTA is used mainly for intelligence-gathering and harassment purposes, the EPA is a more serious affair. This Act widens both police and army powers of arrest; it gives the secretary of state power to intern people indefinitely without trial; and it establishes special

no-jury 'Diplock' courts which can impose severe punishments, including life imprisonment, for 'terrorist' offences. The power to intern has not been used since 1975, though it is still on the statute book and could be reactivated at any time. In any event, a result similar to internment is already achieved in another way: the majority of accused are remanded in custody, even though the evidence the police produce in bail applications is frequently extremely flimsy. And most of those held in custody wait upwards of a year before sentence is passed or they are released.

Three features of the administration of justice under the EPA are particularly important: no-jury courts, confessions, and accomplice evidence.

In 1973 jury trials for so-called 'Scheduled Offences' (mainly 'terrorist' offences) were abolished, and special 'Diplock' courts were set up to try such offences. These courts have no juries and cases are tried by a single judge sitting alone. The establishment of no-jury courts was recommended by Lord Diplock, on the grounds that juries in Northern Ireland are likely to be heavily biased and their members subject to intimidation by paramilitaries. This argument has been strongly challenged by civil libertarians, but remains the official justification for retaining no-jury trials in Northern Ireland.

A striking feature of the Diplock courts is the degree to which the police rely on confessions and accomplice evidence to obtain convictions, and the amount of intimidation and bribery which accompanies this process. It has been estimated (Dermot Walsh, *The Use and Abuse of Emergency Legislation in Northern Ireland*) that confessions are obtained from 85 per cent of people tried for 'terrorist' offences. The confession often provides the main, or even the only, evidence against the accused, and without it the prosecution case would fall to the ground. This reliance on confessions arises because the police find it hard to obtain reliable corroborative evidence in the case of 'terrorist' offences: potential witnesses are either frightened of or sympathetic to the paramilitaries involved. Under these conditions the police clearly have a strong incentive to extract confessions out of suspects by almost any means at their disposal. Moreover, the legal constraints governing interrogation are relatively lax in Northern Ireland, and permit procedures which would be regarded as quite improper elsewhere in the UK.

In mainland Britain the admissibility of confessions is strictly governed by the Judges Rules. These state in paragraph (e) of their preamble,

> that it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice, or hope of advantage exercised or held out by a person in authority, or by oppression.

The Judges Rules place severe constraints on police interrogation procedures. Members of the police who overstep the mark may find that any confession they obtain is ruled inadmissible when the case comes to court. Even under the old Special Powers Act the Judges Rules used to apply in Northern Ireland. However, when the new Emergency Provisions Act was introduced in 1973, the Judges Rules were, to all intents and purposes, abolished for the Diplock courts, and replaced by much looser guidelines. For a confession to be ruled inadmissible it must now be established beyond reasonable doubt that it was obtained by 'torture, inhuman or degrading treatment'. These terms are interpreted so narrowly in practice that it is virtually impossible to secure a ruling of inadmissibility in the courts.

The use of physical violence during interrogation in Northern Ireland has gone through several phases. While internment operated there was no need for the police to build a case against suspects, as they could be detained simply by executive order. However, once internment ended in 1975, then the police had to secure evidence which could be presented in court.

Given the difficulty of obtaining independent testimony, the police were forced to rely heavily on confessions and accomplice evidence. To obtain this kind of evidence they set up special interrogation centres where suspects could be questioned intensively until they broke down, incriminating both themselves and others. Over a period of years there was an avalanche of complaints about police brutality in these centres. Amnesty International sent a mission to inquire into these allegations; police surgeons complained and one of them, Dr Elliot, actually resigned in protest over the government's failure to stop the beatings. Eventually, following the report of the Bennett Committee, which effectively vindicated many of the allegations, new guidelines for interrogation were laid down.

Since then the number of complaints about physical brutality has fallen sharply. However, it remains the case that prisoners are often subject to harsh, prolonged and intensive interrogation. And there are still frequent allegations of prisoners being subject to religious and sexual abuse, threats to themselves and their relations, deprivation of

sleep and other forms of maltreatment. In their nature such allegations are difficult to prove or disprove. Yet it would be naive simply to reject them out of hand. Given the great difficulty of obtaining independent evidence, confessions and accomplice evidence inevitably play a central role in the securing of convictions. So it would hardly be surprising if the police were tempted to use every device possible to obtain such evidence to put before a court.

The second major form of evidence used in the Diplock courts is provided by alleged accomplices. In Britain when this kind of evidence is utilized, it is normally corroborated by other independent evidence. Indeed, juries in Britain are specifically warned of the dangers of over-reliance on accomplice evidence, and where judges omit such warnings convictions will be quashed. As a result, it is rare for people in Britain to be convicted on accomplice evidence alone. In the Diplock courts, however, such evidence is treated very differently. There are no juries to be warned, and the judges themselves have frequently convicted defendants simply on the word of an alleged accomplice, without any corroborative evidence whatever. Moreover, the sentences which follow are often extremely long - 20 years or more is not uncommon.

This means, in effect, that a judge sitting without a jury can sentence a person to prolonged imprisonment on the word of a single informer. Not only does this put immense power in the hands of a judge; it also gives the police an enormous incentive to engage in precisely those malpractices which the normal requirement for corroborative evidence is supposed to discourage. These include intimidating or bribing prisoners into implicating people whom the authorities would like to see taken out of circulation, and fabricating testimony and coaching witnesses to make their story seem plausible to the judge hearing the case. All of these practices appear to have occurred during the 'supergrass' episode of the early 1980s.

Supergrasses

After interrogation procedures were tightened up following the Bennett Report, it became much more difficult to beat confessions out of prisoners. The RUC, which had been forced to pay compensation to some of the victims of its interrogation methods, then turned to a new device for obtaining convictions. Through a combination of threats and promises, selected prisoners from paramilitary organizations were induced to implicate other paramilitaries.

Prisoners facing heavy sentences, perhaps for the second or third time, were offered complete immunity from prosecution or a greatly reduced sentence in return for their co-operation with the police. Others volunteered on their own initiative to co-operate in the hope of such favours. To ensure the future safety of these people, the government undertook to ship them out of the province and finance a new life for them and their families abroad. In return they were expected to stand up in court and give evidence against their alleged accomplices.

The outcome of this new police strategy was a series of spectacular trials in which anything up to 40 or more people were arraigned on the word of a single informer. Lord Gifford QC, in his study on the subject (*Supergrasses: the Use of Accomplice Evidence in Northern Ireland*), has estimated that in 25 trials over the period 1981-3 a total of 446 people were charged on the basis of supergrass information. They included members of both Catholic and Protestant paramilitary organizations.

From a police point of view, the appeal of the supergrass system was obvious. It allowed them to put away large numbers of people whom they genuinely suspected to be paramilitaries, but against whom firm evidence was difficult or impossible to obtain. However, its dangers were equally obvious. Informers had a strong incentive to please their captors by fabricating evidence, and the police themselves had an equally strong incentive to fabricate evidence so as to obtain convictions. In a word, the system was wide open to corruption. For this reason it was strongly attacked by the legal profession at the time.

In recent years the supergrass system has been largely abandoned. One reason for this development was its failure to produce firm convictions. Many initially co-operative supergrasses subsequently withdrew their statements out of fear or remorse, so causing prosecution cases to collapse. Sometimes these supergrasses had already been granted legal immunity before retracting their evidence - which was a double embarrassment to the authorities. In a number of cases which did proceed, either the trial judge or the appeal judges rejected the supergrass evidence because of its transparent dishonesty or inconsistency. In only a minority of instances did supergrass information result in convictions which were upheld on appeal. However, this does not mean that the whole exercise was a complete waste of effort for the RUC. While in operation it caused demoralization and dissension in paramilitary ranks, and put hundreds of paramilitaries behind bars for several years at a stretch.

Policing methods

The Royal Ulster Constabulary is not simply a police force in the ordinary sense of the term. Intermittently since the early 1920s, and consistently since the late 1960s, the RUC has been occupied in trying to crush guerrilla opposition to the state. This involves both a quasi-military campaign against the guerrillas themselves and repression of those sections of the civilian population which support the guerrillas. Both tasks require the use of methods different in kind and intensity from those employed in ordinary policing. Except for a brief period in the early 1970s, the police in Northern Ireland have always been heavily armed. Their present equipment includes automatic weapons and armoured land-rovers.

We shall not here attempt a comprehensive analysis of the diverse strategies and techniques used by the RUC today in their anti-guerrilla campaign. Rather, we shall focus on two aspects which deserve special mention. These are: 'shoot to kill' and plastic bullets.

'Shoot to kill'

Through much of the present conflict there have been persistent allegations that the Crown forces in Northern Ireland have engaged in 'dirty tricks', including the assassination of troublesome opponents. These allegations have always been denied by police, army and government, but on occasion, there has been substantial evidence to support them.

One notorious case occurred towards the end of 1982 when six Catholics were killed by undercover police in three separate incidents. The police were part of the secret E4A squad which had been especially created to engage in covert operations against paramilitaries. Of the six Catholics, two were members of the Irish National Liberation Army (INLA), three were from the IRA and one was completely unconnected with any paramilitary organization. All were shot dead in highly controversial circumstances: five were certainly unarmed, and all could have been captured alive.

A suggestion that there was some unease, even at official levels, was first indicated when four of the police involved in these killings were prosecuted in the Diplock courts. However, one was acquitted in early April 1984 and three more at the beginning of June. In the latter case the defendants were exonerated by the presiding judge, Lord Justice Gibson, who said, in his summing-up on 5 June 1984, that the three police officers were 'absolutely blameless' and commended them for 'their courage and determination in bringing the three deceased men to justice, to the final court of justice'. After the immense criticism produced by these comments, Lord Justice Gibson, in a very unusual move, issued the following statement from the Bench:

> I would wish most emphatically to repudiate any idea that I would approve or that the law would countenance what has been described as a shoot-to-kill policy on the part of the police.

Nevertheless prosecution had not ended the affair. The mysterious circumstances of the six deaths, plus mounting evidence that the police had falsified or concealed information, produced a continuing uproar. Between the two acquittals, the government set up an inquiry to investigate the alleged police cover up. However, the British policeman, John Stalker, who was appointed to head the inquiry was confronted with massive obstruction within the RUC. He was then, himself, the target of corruption allegations and removed from the inquiry. Though subsequently cleared of any malpractice, Stalker was never allowed to return to his Northern Ireland investigations, and shortly after resigned from the police force.

Between 1982 and 1986 more than 30 people, 18 of them unarmed, were shot dead by the police and the army. Though few were left in any doubt that some measure of 'shoot to kill' policy had been followed, it was never established whether such policy was officially sanctioned at top level, or was simply a grass-roots initiative within the police force. Amnesty International called, unsuccessfully, for an independent judicial inquiry, citing as cause for concern, not only the deaths, but the delays of several years before inquests into these deaths were held.

From 1987 onwards the scale of such suspicious killings by the security forces has escalated significantly. Eight IRA members who were surrounded by the army and police in an incident at Loughgall were all shot dead, having apparently been given no opportunity to surrender. In early 1988 an unarmed Sinn Féin sympathizer on his way to work was killed by a soldier at a border checkpoint. The army described the shooting as accidental. A few weeks later, three unarmed IRA members were shot dead by the SAS in Gibraltar. Local civilian eyewitnesses stated categorically that the three were given no chance to give themselves up and were deliberately finished off at close range while lying wounded on the ground. If the testimony of these local

people is correct, then, in law, the Gibraltar shootings constitute murder. Killing defenceless victims, even 'known terrorists' is permitted neither by the normal peacetime rules of policing, nor under military rules of engagement.

Plastic bullets

As well as tackling the IRA and other paramilitary forces, the police in Northern Ireland also have the job of controlling the local communities from which these forces come. Hostility to the British government is often widespread in these communities, especially in the Catholic working-class ghettoes. This hostility is expressed through civil disorder and rioting, to which the police response is sometimes very brutal.

A common weapon used by the police for quelling disorder is the plastic bullet, which itself replaces the earlier rubber bullet. Plastic bullets have been used on a staggering scale. For example, in the space of a single month during the hunger strikes - May 1981 - a total of 16,656 plastic bullets were fired in Northern Ireland. And though described as a method of crowd control, plastic and rubber bullets can be lethal.

Since 1972 plastic bullets have killed 16 people in Northern Ireland and seriously injured many more. All except one of those who died were Catholics; six were aged 14 or under; and at least five were expressly declared by inquests not to be involved in rioting. Only once has a police officer been prosecuted for such a killing: when Catholic John Downe was shot at close range by an RUC man during a demonstration in Belfast. Uniquely in that instance, the entire event was shown on television. However, when the police officer, who was charged not with murder but with manslaughter, came before a Diplock court, he was acquitted.

Deaths, injuries and bombings

Detailed statistics on violence in Northern Ireland are given in Appendix 4. The general picture is as follows. Since 1969, in occurrences connected with the present conflict, there have been over 30,000 shooting incidents, 8,000 explosions, 6,000 malicious fires and 12,000 armed robberies inside Northern Ireland.

There have been hundreds of casualties in bombing incidents in

Britain and the Republic of Ireland, while within Northern Ireland itself over 2,500 people have been killed and 26,000 injured. These figures are large in themselves; when viewed as a proportion of the small population of Northern Ireland they are immense. Violence on such a scale in mainland Britain would mean around 90,000 deaths and 900,000 people injured.

Both the nature and scale of violence have fluctuated considerably. The peak was in 1972 when fighting between the IRA and the British Army was at its most intense, and Loyalist groups were at their most active in killing Catholic civilians. In the space of this one year, 467 people were killed, of whom 146 were members of the security forces (mainly British soldiers), 75 were paramilitaries (mainly Provisional IRA) and 246 were civilians (mainly Catholics). Since 1972 the scale of violence has diminished and during the 1980s the death toll has averaged around 76 a year. This total can be broken down roughly as follows: Royal Ulster Constabulary 15, Ulster Defence Regiment 9, regular British Army 8, paramilitaries 10 and civilians 34.

These figures indicate two main things about the current state of the conflict. To begin with, apart from occasional very major incidents such as the Warrenpoint and Droppin' Well explosions in 1979 and 1982 respectively, relatively few British soldiers have been killed in recent years. Most casualties amongst the security forces are accounted for nowadays by the locally recruited RUC and UDR. This is very different from the early 1970s when British Army casualties were heavy.

What has produced the change is Britain's Ulsterization policy. Under this policy British troops have been withdrawn from action wherever possible, and security put into the hands of locally recruited forces, especially the police, who have been rearmed and placed in the front line. The implications of the figures for RUC deaths are startling. If these deaths continue at the rate observed in the mid-1980s, then *the average career policeman in Northern Ireland will have nearly a 1 in 20 chance of being killed by the IRA during his period of service.* (This assumes that there are 10,000 male full-time members of the RUC, 30 years of service for the average career policeman and 15 policemen killed a year.) If serious injuries are also taken into account, the risk is higher still. To be a policeman in Northern Ireland today is clearly to be in a dangerous profession. The decline in regular British Army deaths and injuries may be a gain for the people of mainland Britain, but it means a new burden for Northern Ireland Protestants who provide the personnel for the local security forces. *Relative to popu-*

lation, 50 per cent more Protestants have been killed in the security forces between 1969 and 1988 than the USA lost during the entire Vietnam War.

The second striking feature about the statistics is the small number of paramilitary deaths in recent years. Apart from some exceptions, like the raid on the Loughall Police Barracks in 1987, few paramilitaries are killed in action nowadays. This is mainly because of the lower scale of violence in recent years, and also the greater professionalism of the IRA.

The second feature to note is the reduction in civilian casualties. This is partly due to the decline in purely sectarian killings by Loyalist paramilitaries, and partly to the greater effort the IRA leadership has made in recent years to minimize civilian casualties. These efforts, it must be said, have not prevented some appalling incidents, such as the massacre at Enniskillen, when eleven innocent bystanders were killed by an IRA bomb on Remembrance Sunday in 1987.

The general picture can be summarized as follows. The situation of virtual insurrection of the early 1970s has given way to a prolonged war of attrition between dedicated professionals. The British Army now plays only a supporting role in this conflict and the main protagonists are all local: on one side the IRA, whose members are virtually all drawn from the Catholic community; and on the other side the RUC and UDR, whose personnel are mainly Northern Ireland Protestants in the service of the British Crown. In the shadows stand the Protestant paramilitaries, who launch sporadic forays into Nationalist areas where their victims are mainly Catholic civilians. Compared to the early 1970s, the violence is no longer so dramatic; the number of civilian victims is greatly reduced; and the bulk of the casualties are people from Northern Ireland.

Even so, it is still significant in both human and political terms. Quite apart from the suffering it represents for the people of Northern Ireland, this violence prevents a return to anything like normality in the province and places a permanent question mark over its future.

Imprisonment and detentions

Since 1972 more than 12,000 people have been charged with 'terrorist-type' offences in Northern Ireland. An equivalent figure for a population the size of Britain's would be well over 400,000. The numbers charged each year fluctuate, but at present the annual average is around 600. An equivalent figure in Britain would be around 20,000.

In addition to people formally charged with offences, a vast number are detained and released after questioning.

While statistics regarding numbers detained are not complete, the information that is published does give a fair idea of the scale of the detention process. Over the period 1975–86, 44,273 persons were detained in Northern Ireland under the Emergency Provisions Act, of whom 40,933 were later released without charge. Over the same period, a further 6,968 persons were detained in Northern Ireland under the Prevention of Terrorism Act, of whom approximately 4,700 were not charged with any offence. The number of detentions has fallen in recent years, but even so it remains very high. In 1986 the total number of people held in Northern Ireland under the two Acts was 2,279, of whom the overwhelming majority were later released without charge.

Some of the people who are detained without subsequently being charged are suspected of illegal activities, but many others are held merely for interrogation. It is thought they *may* have information of value to the authorities. Indeed, the enormous disparity between numbers detained and numbers charged suggest that detention is being used for two main purposes: to enable 'fishing expeditions' by the authorities; and as a mechanism for harassing or intimidating people hostile to the regime.

In England and Wales during 1986, 59,481 persons, mostly Irish, were detained at ports of entry under the PTA. This was an increase of more than 4,000 on the previous year. However, a mere handful were actually charged with any offence. In addition, within mainland Britain, a total of 6,246 persons were detained during the period 1974–86 under the PTA in connection with Northern Ireland. Of these only 528 were charged with an offence. In the mid-1980s detentions in mainland Britain under this Act have varied in the range 150–200 a year.

Treatment of prisoners

We have already described some of the interrogation methods used by the police in Northern Ireland. Another practice which has been widely criticized is that of 'strip searching' women prisoners. This kind of search is most frequently applied to remand prisoners before and after court appearances and after visits, though it may also be applied to other prisoners too. During a strip search, the prisoner concerned first takes off all her clothes and then is examined by a

prison officer to see if she is carrying any forbidden article. Menstruating women are ordered to remove their tampons or pads, and if they refuse their sanitary protection is forcibly removed and inspected.

There has always been strip searching in Northern Ireland, but its use has been greatly intensified since November 1982 when it was made routine in Armagh gaol. Since that date something like 3,000 strip searches have been carried out at Armagh, where at any one time the prison population is approximately 40. Republican women have also been repeatedly strip searched in other prisons. The most striking case was perhaps that of Martina Anderson and Ella O'Dwyer who were each strip searched almost 200 times between January and May of 1986 while on remand in Brixton Prison.

The intensive use of strip searching is justified by the authorities on security grounds, as a vital safeguard to prevent the importation of such items as weapons, explosives and keys into prisons. Critics, on the other hand, argue that strip searching is deliberately intended to punish and degrade prisoners. Whatever the motive behind it, there is no doubt that the practice of strip searching is extremely humiliating for the prisoners concerned, and has profound psychological effects, especially when it occurs during menstruation, or when it is frequently repeated.

Criminalization

Paramilitaries in gaol in Northern Ireland, whether Loyalist or Republican, see themselves as 'political' prisoners or prisoners of war, who have risked their lives and sacrificed their liberty for their beliefs. This is also a common view in the communities from which they come. Between 1972 and 1976 the same view was also accepted by the British government, which gave such prisoners 'special category' status. This meant that they could wear their own clothing, maintain their paramilitary organization and command structure, and that their officers were recognized by the prison authorities.

However, as we saw in chapter 4, special category status for new prisoners was abolished in 1976. Since that time, paramilitary personnel entering gaol have ceased to be treated as prisoners of war; now they are treated as ordinary criminals. This policy of 'criminalization' struck directly at paramilitary prisoners' sense of dignity, and weakened the mutual support system which their tight paramilitary organization had provided. It was fiercely resisted through a series of

hunger strikes in 1980-1, during which ten Republican prisoners starved themselves to death in an effort to gain prisoner-of-war status for their fellow inmates.

Length of sentences

Paramilitary prisoners face extremely long sentences, and have great difficulty in obtaining release. In May 1986 there were 133 Republicans serving life sentences in Northern Ireland, and another 23 'SOSP' prisoners. The latter are prisoners who were under 17 at the time of their alleged offence and hence too young to receive a formal life sentence. Instead they were detained at the 'Secretary of State's Pleasure' - which in practice means a sentence of life. It should be noted that the great majority of life and 'SOSP' prisoners were arrested and/or convicted between 1976 and 1979. This was the time when allegations of police beatings to produce confessions reached a peak. Though investigation practices were subsequently reformed following the recommendations of the Bennett Committee (see p. 55), convictions dependent on confessions which were secured during that period were allowed to stand.

For paramilitary prisoners in Northern Ireland a life sentence is typically much longer than is normal for ordinary criminals. The latter are, on average, released after eight to ten years, in contrast to many Republican prisoners (and a few Loyalists) who have been in gaol for 15 years already, and are likely to remain there for more years to come. The source of this disparity lies in government policy that paramilitary life prisoners should only be released if they completely renounce their political beliefs.

One group of paramilitary prisoners who deserve special mention are those in gaol in mainland Britain. In 1986 there were 37 Republican prisoners in this category. There were also 11 prisoners whom the IRA claims were framed by Britain in connection with events like the Birmingham and Guildford bombings (and over the accuracy of whose convictions there is widespread doubt in establishment circles). There are also a number of Loyalist prisoners on the mainland. Of the Republicans, 23 are serving life sentences and the remainder sentences of 20 to 25 years.

Keeping paramilitary prisoners in Britain when their families still live in Northern Ireland, causes immense hardship. Their relatives, most of whom are very poor, are put to great expense and difficulty

when making visits. This burden is increased by the practice of moving prisoners around the country without notice and keeping them for prolonged periods in solitary confinement. The policy towards paramilitary prisoners contrasts strongly with the compassionate treatment received by British soldiers charged with serious offences in Northern Ireland. They are routinely returned to Britain to serve their sentences. Indeed, the only regular soldier to be convicted of murder while on duty in Northern Ireland, was rapidly transferred to a prison in Britain, and though sentenced to life imprisonment was released on parole within 2½ years and returned to his regiment.

Censorship

The record of the British media in covering events in Northern Ireland has been a sorry one. Ranging in their approach from the superficial to the positively misleading, both the newspapers and the broadcasting services have done little to clarify the reasons for the conflict. They have presented the differences between Northern Ireland's two communities as a curious, archaic, tribal struggle between people who cannot live peaceably beside each other as normal people supposedly do. The paramilitaries, especially the Republicans, are shown solely as murdering madmen with no respect for human life or the rule of law. Overall, media coverage has concentrated on violence and 'terror' shorn of any political context - and hence of any rational basis, and of any hope of its ending.

In part the distorted and inadequate media presentation of Northern Ireland is due to the views of journalists and those directly controlling broadcasting and the press. However, it also reflects the degree to which media - in particular television - coverage is shaped by government demands. Over the years both the BBC and the IBA have repeatedly bowed to political pressure to modify programme content.

The best known and most public example of television censorship occurred in 1985 when a film in the BBC series *Real Lives* was withdrawn following representations by the government. In this film, Martin McGuiness, a leading member of Sinn Féin, and Gregory Campbell, a prominent Loyalist, were interviewed at length. The home secretary objected strongly and the BBC's governors withdrew the programme even though it was already complete and advertised in the *Radio Times*. However, following a widely supported protest strike by BBC journalists, the governors backed down and agreed to

put on a modified version of the film in which Martin McGuiness was shown in a more unfavourable light.

Yet the *Real Lives* incident is only the most publicized in a long series. Since 1968 some 50 major programmes have been banned, delayed, cut or altered in accordance with government objectives, for the most part without the public knowing that any of these interventions have occurred. Most affected have been news or current-affairs programmes (including *This Week, Tonight, Panorama, World in Action, 24 Hours*, and also a large number of documentaries), but other programmes have also fallen foul of the censorship process. Thus, in 1981, BBC's *Top of the Pops* was forbidden to screen a video which included a collage of street scenes from Northern Ireland (described by *The Times* as 'utterly uncontentious'). Several plays have also been delayed or dropped.

The rules governing the screening of television programmes about Northern Ireland are contained within two documents. BBC programmes must be dealt with according to the Corporation's *News and Current Affairs Index* (see Appendix 6), while those on ITV are subject to the Independent Broadcasting Authority's *Official Guidelines*. Both of these documents specify that all programmes dealing with Northern Ireland must be 'referred upwards' for approval by top-level management. *No other political topic is subject to such rigid oversight*. It amounts in effect to a form of managerial censorship, and ensures the content of programmes is centrally controlled and coverage of Northern Ireland determined in accordance with government priorities.

This does not quite result in Republicans being kept off TV screens altogether. However, their appearances are rare, and when they do appear, the manner in which they and their views are presented is never positive, and generally very unsympathetic. Senior BBC personnel have stated explicitly that it is Corporation policy to give Republican spokespersons a hard time, and to treat them as 'hostile witnesses'. Republican interviewees are subjected to hostile questioning, repeated interruptions and sharp contradiction. In addition they are always balanced by a countervailing view. By contrast, pro-British politicians are frequently interviewed; they are rarely met with hostility; and it is normal practice that no rebuttal is included from the Republican side.

None of this is surprising. No state engaged in military struggle allows genuinely unpartisan coverage of their opponents' viewpoint. However, it does underline how the conflict in Northern Ireland makes nonsense of the supposed independence of the British media.

And it also highlights how little access people in Britain have to any information about Northern Ireland other than that which matches the government's point of view.

The Republic of Ireland

The erosion of civil liberties resulting from the conflict in Northern Ireland extends beyond the United Kingdom. It also affects the Irish Republic, where a whole series of special measures have been used to control the IRA.

In the 1940s hundreds of Republicans were interned and six IRA members were tried by military tribunal and executed. In 1972 a 'Special Criminal Court' was set up in Dublin, in which trials would be conducted by three judges sitting without a jury. Since then around 2,000 Republicans have been tried in this court, of whom three-quarters have been convicted and sentenced to imprisonment.

Alongside this judicial apparatus, there is also a severe system of censorship designed to prevent Republicans obtaining any exposure at all in the official media. Under section 31 of the Broadcasting Act it is illegal to interview on public radio or television any member of Sinn Féin, or of any organization banned in the North by the British government, or to publicize the activities of any of these organizations.

This is a more overt form of censorship than exists in either Britain or Northern Ireland. It means that news and current affairs coverage in the Republic is badly distorted. For example, while hard-line Loyalist MP, Ian Paisley, can be broadcast, the Sinn Féin MP for West Belfast, Gerry Adams, can not. Indeed, when Adams retained his seat in the 1987 general election, the Republic's radio and television services carried interviews with his opponents commenting on why they had lost, but nothing from Adams himself. To hear the Sinn Féin MP, southerners had to rely on radio and TV from Northern Ireland, where he *was* interviewed.

In fact, the operation of section 31 is so extreme, it can be quite absurd. If anyone, from a champion dog breeder, to the duly elected chairperson of a local council highways committee, happens to be a member of Sinn Féin, she or he cannot appear on radio or television, even to be interviewed about dogs or holes in the road. Section 31 has been severely criticized by, for example, Irish trade unions and Cardinal O'Fiach, Catholic Primate of All Ireland. A poll carried out in 1986 by the National Institution of Higher Education in Dublin showed that 53 per cent of people disapprove of section 31 and 73 per cent think Sinn Féin should have access to public radio and television. Approval of the ban was concentrated in upper-middle-class people over 50. However, this law remains in force today.

Twenty years into the present Northern Ireland 'troubles' the abuse of civil liberties has now become the norm - in Britain as well as Northern Ireland, and also in the Irish Republic. Internal banishment, detention without cause on entering Britain, no-jury trials - all are sanctioned by law. Arbitrary arrests, shooting dead rioters or suspected 'terrorists', fabricating trial evidence - none of these are legally sanctioned, but all have happened and all have gone unpunished. Deaths and injuries have occurred on a scale whose immensity is only masked by the small size of the Northern Ireland population.

Meanwhile, news in the media is censored and manipulated. As a result, people in Britain are denied the opportunity to arrive at an informed opinion about Irish events, and about policy making in this area.

An Appraisal of Torture in International Law and Practice: The Need for an International Convention for the Prevention and Suppression of Torture

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SECTION I

Torture in historical and geographic perspective

An examination of the scope of occurrence of the practice of torture reveals that it has existed through all periods of history, spanning each of the twenty-one recorded civilizations in the world. In some times and places the practice has been more frequent or widespread than in others, but the phenomenon has been remarkably similar throughout history and geography. The following is a brief survey of torture through time and space intended merely to provide perspective. It will demonstrate that the practice of torture is neither new nor confined to any single political system, regime, culture, religion or geographical location.

A. - Early Evidence of the Practice

The coercive leverage of torture was, like the lever itself, a discovery of early Man that was already flourishing and leaving its mark on societies when their first records were written. For those who would erase torture from world civilization, it is worth considering how long it has been in use.

The first traces of the practice of torture can be found in some of the earliest historical records left by Man. Drawings have been discovered showing tax collectors of ancient Egypt beating the soles of the feet of peasants in order to coerce them into revealing hidden stores of grain (1). The practice apparently occurred in other contemporary civilizations, but the Egyptian use depicted in these drawings represents a degree of sophistication uncharacteristic of that era, since torture was generally at that time no more than a form of punishment.

In ancient Greece, both Aristotle and Demosthenes expressed the view that torture was the surest method for obtaining evidence and slaves in Athens were frequently subjected to it. However, free men were expressly exempted by a psephism passed in the arconship of Scamandrius. In that period torture was frequently administered in open court by such means as the rack. A list of tortures is presented in Aristophanes' *Ranae*, and at least two Greek despots, Zeno and Anaxarchus, are reported to have used torture widely (2).

The evolution of the practice of torture under Rome provides

a curious insight into the European heritage in this regard. No existing fragment of the Twelve Tables alludes to the practice, and Cicero argues that torture was based upon custom. Writers have described torture by masters of their slaves during the Republic, but during the early empire restrictions were imposed on this practice. In the later empire, the laws relating to torture were codified, largely under the titles *De quaestionibus* in the Digest and the Code. Under these laws only slaves were subject to torture in civil cases, but in criminal cases only certain classes of high ranking persons and their families were exempt and a thorough procedural and substantive guide for the practice was in force. However, the use of torture was restricted to situations where evidence from other sources had already been assembled and a confession by the accused was the only way to fill the remaining gap (3).

In other, non-Western, classical civilizations torture also flourished and was still in use when early Western travellers first visited these regions (4).

B. - Torture in Various Contexts

It has been suggested that torture may be defined as suffering inflicted for a purpose. Thus, if torture is to be dissected for study, it must be divided according to its different purposes, and these purposes vary according to the context in which torture occurs. Historically, three general contexts can be distinguished: war, administration of criminal justice and destruction of political adversaries.

1. - In Warfare

The use of torture in connection with armed conflicts reflects the evolution of the art of warfare. Under classical era principles of warfare, defeated persons, whether former combatants, and whether non-combatants of a hostile state or of a state formerly subjugated by one's opponents, were subject to enslavement or any form of treatment expedient to the conquering forces (5).

In the Orient, where sophistication came earlier to human civilizations, regulation of warfare to minimize incidental suffering was first undertaken. Thus by the fourth century B. C. the customs of war in China had been recorded by Sun Tzu, and among them were provisions for sparing the wounded and elderly (6). At about the same period the *Book of Manuscriptu* cronicled Hindu regulations for the conduct of war (7). Other efforts to limit needless suffering in war were made in the Greek, Roman, Hebrew, Babylonian and Muslim civilizations (8). But the first major efforts in the West aimed specifically at minimizing

suffering of combatants were made in medieval Europe in the form of bans on such weapons as the harquebus, poison and the crossbow (9).

Such a pattern was appropriate to the early nature of warfare a tribal and later imperialist phenomenon. But with the development of feudal societies, warfare assumed a role more limited in scope, though just as frequent in occurrence, as a contest among princes rather than peoples. Under this scheme, the general population had relatively little at stake and participated only to a limited degree, so that it was generally spared the effects of defeat. The practice of enslavement and therefore torture of conquered peoples receded. During this period the consequences of defeat for former combatants were subject to elaborate customs of which there were many local variations, but generally, treatment of vanquished combatants was tempered by principles of chivalry (10).

As the art of war advanced to its next stage of sophistication, however, two factors were introduced that had a crucial impact on the treatment of persons in the hands of their enemies. First is the evolution of nationalism and so-called all-out war. Second is the evolution of weapons and tactics capable of delivering decisive surprise attacks. The first of these factors had the general result of blurring the distinction made previously between combatants and non-combatants, because civilians openly chose sides in such conflicts and provided valuable support to their champions. Accordingly, civilians came to experience more of the consequences of defeat as well as the destructive impact of war. The second of these factors produced a great need in military planning for information about activities and designs of the adversary that had been of relatively minor importance in earlier times when such information was easily obtained by routine scouting.

The two factors in combination resulted in a new dimension to warfare civil resistance to military forces. Such resistance derived its potency from secrecy and its ability to result in surprise attacks.

Thus, in modern warfare, the need for obtaining information from captives reached great heights, and captives were not necessarily subjected to differring treatment on the basis of combatants or non-combatants status. As a means to extract information from unwilling captives, torture was applied.

In recent decades, the civil resistance aspect of armed conflicts has developed an almost independent life of its own in wars of national liberation and separatist movements. This has resulted in greater attention to the problems of learning the identities of leaders and participants in such movements and the whereabouts of their dwellings and weapons storage sites. Con-

sequently, torture of captured members of such organizations to obtain such information has become frequent.

In summary, modern warfare has seen the adoption of torture as a means of obtaining needed information about one's adversaries, and such practices have not been confined to any single region of the world.

2. - Torture and the Criminal Justice System

a) *As a method of proof*

As stated above, late Roman Law recognized the concept of torture as an aid to fact-finding in criminal investigations and trials. However, this practice, or abuses associated with it, met with disfavor from the Church, and in 384 A. D., its use was condemned (11).

With the fall of the Roman Empire in the West, the laws of Germanic tribes replaced Roman law, and the practice of torture was replaced by the ordeal, or *arbitrum Dei*, as a form of proof in criminal proceedings (12).

For nearly a millennium, the criminal law of Europe evolved around use of the ordeal to solve difficult fact-finding problems, so that, when the Church condemned the ordeal at the Fourth Lateran Council (1215) (13), a crucial facet of criminal process was destroyed. Coinciding in time with renewed scholarly interest in the classical period, it is not surprising that the creation of this *lacuna* in judicial process was followed by reinstitution on the Continent of torture, perhaps through rediscovery of Roman law principles (14). In England, distant from Renaissance influence and developing a legal system that balanced principles of the Norman law with those of the natives, this *lacuna* was filled with the jury system (15).

Thus, on the Continent, where formal proof of guilt could not be established, application of torture to the accused was prescribed in order to elicit a confession and thereby establish the requisite formal proof (16). The requirement that confessions be exacted without use of leading questions and that they contain information only a guilty person would know encouraged torturers to obtain as many facts about the crime as possible, and the process of torture was subject to elaborate regulation (17).

Eventually, torture was applied not only to establish the guilt of an accused, but also to obtain names of accomplices and other information useful to law enforcement authorities. Thus, in France, *torture preparatoire*, which was applied before conviction in order to obtain proof, was accompanied by *torture preleable*, which followed conviction and concentrated on eliciting further useful information (18).

In England, although the common law jury had made use of torture unnecessary for achieving criminal convictions, its other uses were not overlooked. Thus the *peine forte et dure* was applied to coerce individuals who refused to plead at all, and thereby sought to avoid forefeit of their lands for felony convictions (19).

Torture was also used in England without reference to the common law where the Star Chamber, Crown or Council found it expedient. Dangerous felons were sometimes subjected to torture in order to produce needed leads for their prosecution, but the classic victim of torture in England was the person suspected of treason and therefore suspected of knowing the names and plans of persons hostile to the Crown (20).

A related development in Western Europe may be worth considering at this point, that of oath-taking. Whereas the common law courts of England recognized a privilege for accused persons to refrain from testifying, first the King's Council, then the Court of the Star Chamber adopted a requirement that an accused testify under oath. Ecclesiastic Courts had employed the Compurgation oath, whereby a suspect and oath-helpers testified under oath. Active interrogation was not at first a factor in this process, but later an « inquisitorial » oath was adopted under which the ecclesiastic judge « inquired » into the truth of the matter (21). In contrast, to prevent coercion of confessions, the Hebrew system of justice did not permit consideration of admissions by an accused (22).

At this point mention must be made of the Inquisition, under which ecclesiastic courts came to interrogate accused heretics with the aid of torture. Certainly in procedural respects this process resembles use of torture in a system of criminal justice to obtain evidence. However, the subject of the Inquisition was not criminal justice, but rather orthodox thought, speech and behavior. Accordingly, full treatment of this matter is reserved for the heading, « Suppression of Political Opposition ».

Torture was late in arriving in Russia, and was abolished officially in 1801, but cases of torture were reported as late as 1847 under Czarist Russia (23).

In the United States a constitutional ban against coercion of confessions has been in effect since the creation of the current federation (24), but instances of confessions coerced by mild forms of torture nevertheless occurred (25) and considerable judicial energy has been focused on eliminating the conditions which cause such practices (26).

In medieval Japan, persons tried for theft were forced to hold a red hot iron, so that the presence or absence of a burn could be used to determine guilt or innocence respectively. In

addition to this remnant of trial by ordeal, confessions were at times extracted by means of an adjustable boot of planks ([27]).

In the Chinese sphere, torture-obtained confessions were prescribed by the code of the Manchu Dynasty. Torture not in keeping with these legal prescriptions was nevertheless frequently applied, and although all torture was officially abolished at the beginning of the 20th Century, reports of isolated instances of the practice continued until the time of the Communist revolution ([28]).

In summary, torture to extract confessions was at one time, a part of most legal systems in the world, but now has been rejected by virtually all nations.

b) - *Torture as punishment*

In addition to its coercive use, torture has, because of the terror it inspires, always been viewed as an effective mode of punishment under the deterrent and retributive theories of punishment. Thus, even while torture was refined to its full coercive potential, European states continued to apply it in non-coercive settings.

In England, torture by mutilation appears in pre-conquest codes and in the assize of Northampton (1176). Later examples were burning for heresy, drawing and quartering for treason, branding in the hand for felonies, the pillory, the stocks and the ducking stool ([29]). Elsewhere, in the British Isles, corporal punishment for certain offenders exists to this day ([30]).

In Continental Europe, four grupings of states are useful in following the practice of torture ([31]). In those states of Roman law influence, such as Spain, Italy and, to a lesser degree, France, governmental use of torture was generally confined to coercive purposes.

The Germanic states, the Netherlands and Austria, though subject to a somewhat different legal tradition, took much the same view of torture as their Roman law Neighbors and generally confined its use to coercive purposes.

But in the Slavic and Scandinavian nations, a somewhat different picture is to be found. In Russia, the Sudebnik of Ivan the Terrible (1497) mentions its use in punishments, and at times it was even used as a measure against debtors. In Scandinavia, Iceland and Denmark at an early date had regulated its official use in punishment of criminals, and although the practice was never official in Sweden, it was commonly imposed by extra-judicial authorities called secret committees. The « cave of roses » where reptiles were kept for the purpose of torture was closed by Gustavus III in 1772.

Throughout Europe, but especially in Mediterranean states, sentencing to servitude in military galleys became a widespread

practice, and conditions of work as oarsmen on such vessels were considered worse than death (32).

In Asia, Japanese law was particularly severe. The punishment for theft involved tying the offender to two large canes in the form of a cross, then his body was twice run through diagonally with a spear. Crucifixion was also in general use (33).

In the Chinese sphere, which included Burma and Vietnam for purposes of criminal code influence, such punishments as flogging and the cangue, a device similar to the pillory, were common. The most infamous, however, was execution by slow cutting into pieces (34).

In the United States, officially sanctioned extreme torture was confined to the witchcraft trials of colonial days. However, less extreme means such as public whippings continued until the 20th Century, and less official acts, such as torture of slaves by masters and mistreatment of ethnic minorities by vigilante groups have also occurred (35).

Islamic law still provides for such punishments as severence of a hand for theft. The last reported proven theft in Saudi Arabia, which imposes this penalty, was in the 1950's, when the operation was done surgically (36).

Throughout the world there are sporadic reports of unofficially imposed torture as punishment, usually at the initiative of persons charged with maintaining custody of prisoners (37).

3. - Suppression of Political Opposition

The linking of the Inquisition with suppression of political opposition rather than punishment by torture or extracting confessions by torture is perhaps a subjective decision, but appears sound when one views the overall purpose of the institution.

Although heresy was a crime and the admission of guilt was clearly a confession, the setting in which the Inquisition was founded was not one that would generally be regarded as one of criminal problems. Rather, it was a context of cultural transition and the purpose of the Inquisition was to root out vestiges of the former Islamic culture and to nip any other unorthodox behavior or thinking in the bud (38).

It would serve little purpose here to detail to variety of means used to extract confessions under the Inquisition, but it may be worth noting that the actual practices very often exceeded the measures prescribed in the various codes of instruction that where to have governed the process (39). It may also be noteworthy that Basque people were numerous among the victim of the Inquisition (40).

At other places and times throughout the world, the use of torture to suppress political opposition has generally coincided

with the arrival of nationalism and the emergence of modern nation-states. Of course, prior to that time persons accused of treason were subjected to extremely severe treatment, but the scale of such practices could not compare to that applied against gypsies and mountain peoples of Central and Eastern Europe (41) when they stood in the way of forging a homogeneous national culture. As nationalism gripped other regions of the globe, similar mass persecutions were undertaken, from the religious wars and persecutions of the Reformation era in Europe to tribal persecutions in Africa and ethnic persecutions of an un-official character in Southeast Asia (42).

But the most severe and systematic uses of torture against political opponents have occurred in nations that have already passed through the stage of nationalistic formation, but have arrived at a stage of national ideological crisis. Such states may be divided roughly into two classes: those in which drastically centralized power is an essential feature of the political system; and those in which divergent forces threaten to topple the central government and either replace it with an ideologically dissimilar system or give rise to a fractionalization of the governmental system. In the former case, absolute stability is essential to the government as constituted, whereas in the second gross instability is threatening to emerge at any moment.

The clearest examples of the former class are those states with a totalitarian ideology.

The second class of states is far more numerous, because it embraces states that reflect a variety of political structures, yet see themselves as facing potential disruption by political dissidents.

Summary

A detailed examination of the components of the contemporary practice of torture is reserved for Section IV, its psychological aspects are discussed in Appendix C, and a cautionary note on the state of intelligence on current torture activity follows immediately. It is appropriate to mention here, however, that at least one reliable organization has recently compiled a world survey of torture that reports incidents and patterns of torture on every continent and in states of all cultural, political and religious characters (43).

In reviewing the overall history of the practice of torture, several observations can be made. First, the practice is restricted by neither time nor geography; second, the frequency of resort to torture has neither steadily decreased nor increased with the passing of time; third, the circumstances in which a given state finds itself seem more important than any cultural predisposition in determining whether or not torture will be resorted to.

Thus, it may be concluded that no political system in any part of the globe is necessarily immune from the practice of torture, because overall circumstances may change, and adoption of torture is based on perceived expedience.

4. - The Contemporary Practice of Torture

While the preceeding material has been aimed at providing a perspective on torture that spans both geography and history, the formulation of policy concerning torture is of course dependent on the facts of the practice in the present.

Such factual data, however, are not readily available. As will be discussed in Section III, the practice of torture is extremely unpopular with influential schools of thought, so it is not surprising that practitioners of torture find it impolitic to assist in wide dissemination of information concerning their activities. Moreover, as will be detailed in Section V, the practice of torture is expressly or implicitly outlawed by nearly all states including those states in which its existence is reliably reported. Accordingly, those persons with knowledge of such activities tend to be persons guilty of perpetrating, conspiring to commit or concealing a crime, and are therefore unlikely to volunteer information.

The result is that information concerning the contemporary practice of torture is somewhat limited, and opportunities to verify such reports as do exist are rare. However, certain organizations have made it their business to gather such information on a global or national scale (44), and the consistency of their findings strongly suggests the reliability of their reports. Furthermore, from these reports there emerges a reasonably clear picture of the mechanisms by which information concerning torture is inhibited.

These mechanisms are important to understand and appreciate because they: 1) describe the conditions and limitations of available data for social-policy formulation; and 2) suggest the evidentiary hurdles that would confront implementation of any anti-torture policy.

a) *Problems of Secrecy*

The deliberate efforts of perpetrators of acts of torture to conceal their identities take several forms. First, the circumstances in which victims are seized and delivered to places of torture frequently make it impossible for even witnesses of the seizure to identify those responsible.

Frequently, victims are seized in their homes or in transit late at nigth by persons announcing their status as authorities only in the vaguest terms, if at all. The captors' dress may be

distinctively military or undistingushed, but rarely will they bear identifying tags.

Secondly, the identity of torturers if often protected by con cealing the site of the torture. Thus, victims are often blindfolded or otherwise rendered unable to trace their journey from point of capture to site of torture. Such sites are frequently carefully removed from other facilities, either by distance or by security-assuring systems of doors or passageways.

Thirdly, no records of the whereabouts or treatment of torture victims are kept in normal files. And, finally, personnel at torture sites are frequently identified only by nicknames. How much of this procedure is motivated by concern for security against escape of victims, attacks by victims' associates or threat of reprisals against individuals responsible for torture is a matter of speculation. But these measures clearly serve to render investigations of allegations of torture extremely difficult.

Thus, when a person has been arrested under such circumstances, inquiries concerning that person's whereabouts are generally met with a denial that he is in custody at all, and it is generally impossible to find evidence to the contrary. After the fact, when the victim alleges that he has been tortured, he is unable to provide sufficient evidence of the site where the torture took place or the identity of his torturers to make substantiation of his claim possible by persons not privy to these secret places, identities and records.

Thus, the questions frequently remain unanswered whether: a) those who tortured the victim were doing so pursuant to a general or official policy; b) those who deny the torture occurred are lying or are merely unaware of the acts of subordinates or persons in separate branches of the state's security forces; or c) the person alleging torture is lying.

b) *Hinderances*

Besides the clandestine activities surrounding the practice of torture, several other factors make assembly of evidence regarding claims of torture difficult.

First, many modern methods of torture leave no marks, so that it may be difficult to establish authoritatively whether an individual alleging torture was in fact, subjected to abuse.

Secondly, authorities of most states are uncooperative in investigating allegations of torture. Such an attitude may reflect: a) A suspicion that the charge is made solely for political purposes, to embarrass the government, so that cooperation would tend to give undesirable publicity and suggest soundness of the charge; b) A naive, but sincere belief that, because the higher authorities publicly disavow such methods, torture could never occur at a lower level either with or without official sanction;

c) A lack of concern about the possibility of torture occurring based either on indifference toward the matter or confidence that those persons being subjected to torture deserve such treatment; d) A belief that public investigation of such charges is harmful or unnecessary and that an informal internal inquiry is more appropriate, although outsiders would never know the result, or even whether such action were taken; e) Complicity of some degree in the practice, so that any investigation of the matter might adversely affect the official being asked to authorize the inquiry; or f) The presence of a *de facto, sub rosa* policy of torture by higher officials, covered up routinely by denials and other lies.

Even such impressive evidentiary hurdles as these might be overcome if it were possible to produce several alleged victims of torture simultaneously who had suffered in the same place under the same persons at the same time. Their consistent stories — or inconsistencies — would serve to either establish an undeniable case that would necessitate an investigation in the interest of publicity, or would show the alleged victims to be liars.

However, such multiplicity of witnesses is rarely possible to achieve in connection with allegations or torture, for several reasons: 1) The threat of further torture may frighten many potential witnesses into silence; 2) The experience itself may have affected the memory or coherency of some potential witnesses; 3) Many torture victims are transferred after torture to prisons, where they are unavailable to investigators; and 4) Other torture victims go underground or flee the country after their ordeal, rendering them inaccessible to their enemies and investigators alike.

The factors noted here are pregnant with significance for policy-making, whether in evaluating the available data upon which to base decisions or anticipating future action regarding specific allegations of torture.

For the purposes of the present discussion of the scope of the practice of the phenomenon, it is sufficient to say that torture continues to occur in a wide variety of political and cultural contexts around the world. A detailed examination of the present practices is deferred to Section IV.

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(1) G. I. A. D. Draper, « The Judicial Aspects of Torture », at 1, presented to the International Institute on Humanitarian Law, 30 August to 3 September, 1977 San Remo, Italy.

(2) G. W. Keeton and J. Williams, « Torture », *Encyclopaedia Britannica*, Vol. 22, p. 311 (1946).

(3) See, e. g., Lipenius, *Bibliotheca realis juridica*, s. v., «Tortura », (1679); K. Kelbing, *Die Tortur* (1913), and Justinian, *Corpus Juris. See also,*

P. De Gallinion, *Traite des Instruments de Martyrs et des Divers Modes de Supplices Employes par les Paiens contre les Chretiens* (1904); J. Moreau, *La Persecution du Christianisme dans l'Empire Romain* (1956); H. Gregoire, « Les Persecutions dans l'Emprie Romain » 46 *Memoire de l'Academie Royal* 1 (1951); G. de Lacaze-Duthiers, *La Torture a travers les Ages* (1961); A. Mellor, *La Torture, son Histoire* (1949); G. Scott, *The History of Torture Throughout the Ages* (1940).

(4) *See, E. g. Ta'T sing Lu Li,* (G. T. Staunton, ed. 1810), and J. Murdock, *History of Japan* (1903).

(5) Grotius, *De Jure Belli ac Pacis* (F. Kelsey ed. 1964), p. 649.

(6) Sun Tzu, *The Art of War* (Giles transl. 1944).

(7) *See,* 1 *The Law of War* 3 (L. Friedman ed. 1972).

(8) *See,* A. Aymard and S. Auboyer, *L'Orient et la Grece Antique,* 293-99 (1951), C. Fenwick, *International Law* 7-8 (1965) and L. Friedman, *supra* note 7.

(9) C. Fenwick, *supra* note 8 at 667; H. Maine, *International Law* 138-39 (2d. ed. 1894).

(10) Grotius, *supra* note 5, at 723 *et. seq.*

(11) Keeton and Williams, *supra* note 2 at 312.

(12) L. Langbein, *Torture and the Law of Proof* (1977) at 5.

(13) *Id.* at 6.

(14) *Id.* at 8.

(15) *Id.* at 73-74.

(16) *Id.* at 7-8.

(17) *Id.* at 15.

(18) *Id.* at 16-17.

(19) *Id.* at 74-77. See also, L. Parry, *The History of Torture in England* (1933).

(20) *Id.* at 79-82.

(21) *See,* Bassiouni, « The Privilege Against Self-Incrimination: A Historical Analysi and Contemporary Appraisal », in *Law in the United States of America in Social and Technological Revolution,* (J. Hazard and W. Wagner ed. 1974).

(22) *See,* Bassiouni, « A Survey of the Major Criminal Justice Systems in the World », in *Handbook of Criminology* (D. Glaser, ed. 1974).

(23) Keeton and Williams, *supra* note 2 at 313.

(24) U. S. Const., 8th Amend.

(25) A bizarre example is the case of *Rochin v. Calif.,* 342 U. S. 165 (1952) in which a suspect was subjected to stomach pumping in order to recover evidence in the form of illegal drugs that he had swallowed.

(26) *See,* e. g. *Miranda v. Arizona,* 384 U. S. 436 (1966), and materials discussed therein.

(27) Keeton and Williams, *supra* note 2 at 314.

(28) *Id.*

(29) *Id.* at 311.

(30) *See, E. g., Tyrer v. United Kingdom,* Application No. 5856/72, Report of the European Commission of Human Rights, 14 Dec. 1976, involving the practice of birching the Isle of Man.

(31) Keeton and Williams, *supra* note 2 at 312.

(32) L. Langbein, *supra* note 12 at 44.

(33) Keeton and Williams, *supra* note 2.

(34) *Id.*

(35) Examples of U. S. practices now abandoned as violative of the eighth amendment of the U. S. Constitution include: long prison terms for entry of a known false statement into public records in the Philippines, *Weems v. U. S.,* 217 U. S. 349, 30 S. Ct. 544 (1910); divestiture of citi-

zenship for wartime court martial conviction, *Trop v. Dulles*, 356 U. S. 86, 78 S. Ct. 590 (1958). A related constitutional protection, the 13th Amendments's prohibition of involuntary servitude, has been instrumental in regulating prison labor. *See*, M. C. Bassiouni, *Criminal Law and Its Processes* (1978), at Section 5. 2. 6. *See also*, E. Lavine, *The Third Degree* (1930) for American problems of that era.

(36) Bassiouni, *supra* note 22 at 547.

(37) *See generally*, Amnesty International *Report on Torture* (1975).

(38) J. Lauret et R. Lassierra, *La Torture et ses Pouviors* (1973) at 12. *See also*, P. Dominique, *L'Inquisition* (1969) and J. Guiraud, *Histoire de l'Inquisition au Moyen Age* (2 vol. 1935, 1938).

(39) *Id.* at 14.

(40) *Id.* at 15.

(41) *Id.* at 18.

(42) Of particular note are the ethnic and religious disturbances in Sri Lanka, Malaysia and the Southern Philippines.

See generally, Van den Wyngaert, « Repressive Violence; A Legal Perspective», in *Repression and Repressive Violence* (M. Hoefnagels ed. 1977).

(43) Amnesty International, *supra* note 37, pp. 114-240.

(44) Among them are: Amnesty International Christian Democratic World Union, International Catholic Child Bureau, International Commission of Jurists, World Confederation of Labour, World Peace Council, World Peace Through Law Center, the Anti-Slavery Society, Arab Lawyers Union, Friends World Committee for Consultation, International Council of Social Democratic Women, International Council of Women, International Federation of Free Journalists, International Federation of Human Rights, International Federation of Resistance Movements, International Federation of Women Lawyers, International Federation of Women in Legal Careers, International League of Human Rights, International Movement for Fraternal Union Among Races and Peoples, International Peace Bureau, International University Exchange Fund, International Young Christian Workers, International Youth and Student Movement for the United Nations, Movement Against Racism, Anti-Semitism and for Peace, St. Joan's International Alliance, Women's International Movement for Pea ce and Freedom, World Association of World Federalists, World Jewish Congress, World Muslim Congress, World Muslim League, World University Servic , and World Young Women's Christian Association.

SECTION II

The relativity of Torture

Although there is sufficient consensus or understanding concerning the extreme forms of « Torture », to permit its general use the precise limits of the conduct or consequences it reflects are not clearly established. It is generally agreed that an act of « Torture » involves the infliction of severe physical or mental pain or suffering (1). Some authorities, however, would further limit the applicability of term to instances where such infliction is done for the purpose of coercing the victim's will (2), while others discount the significance of the purpose of the act, requiring only that it be intentional (3).

Without passing judgment on this issue, some useful observations may be made regarding the application of the common understanding of deliberate infliction of severe physical or mental pain or suffering.

Social Values and Individual Tolerance

The concept of « severe » physical or mental pain or suffering is, essentially, a subjective one. The purpose of underscoring the relativity of torture is to highlight the fact that the overall significance of a given process or enforcement of societal norms and the individual's tolerance thereto must be examined in the cultural context in which it is applied.

No action by a given society to compel compliance with its norms can be effected without some degree of coercion. Such coercion necessarily involves some degree of physical or psychological suffering to the individual in question.

In assessing the degree of such suffering sufficient to justify the application of the label « severe », two difficulties are encountered. The first considered is that there is no means of measuring individual suffering or quantifying it. But a more subtle yet more significant difficulty is that, even if a measurement technique were divised, the choice of a level of suffering to be labeled « severe » would be a difficult task. The reason is simply that the judgment as to whether a given degree of suffering is « severe » depends upon a variety of factors including circumstances of its infliction, tolerance of the individual and the ultimate values of the society in which it occurs.

A useful example is to consider the situation in which a dangerous felon refuses a police order to halt and is shot while attempting to flee the scene of a crime. Such police action is universally accepted, yet its consequence will be a considerable degree of suffering to the victim. In fact, given the inability to pre-determine with accuracy the course of the bullet, this action could result in injuring or killing the individual in question. But, under the circumstances, the propriety of the action is unquestioned.

A second example would be corporal punishment of offenders, as is common in some legal systems, where such treatment is regarded as proper. However, in a society where corporal punishment has been abolished, its administration would be regarded as outrageous.

Thus, the quantum of suffering that is properly regarded as « severe » remains relative even when the circumstances of its infliction are socially acceptable and in some cases, individually tolerable. It is this aspect of relativity that is most difficult to deal with, yet this aspect may also be critical for evaluating the legitimacy of a given coercive practice.

Societies regulate themselves by the application of socially acceptable sanctions to those who violate societal norms. The acceptability of those sanctions is usually deemed indispensable to their overall effectiveness. However where the practice is socially unacceptable, those applying such unacceptable practices cannot claim to be acting on behalf of society and therefore the sanction is deprived of its symbolic significance and ceases to isolate the offender from society. Furthermore, those applying the sanction appear as abusers of society's right of enforcement of its norms and thus become themselves violators of those norms. The application of socially unacceptable sanctions undermines the legitimacy and integrity of the legal process and the Institution which employs it. Consequently, the short-term goals of such sanctions lead to counter-productive long-term consequences which affect the credibility, legitimacy and integrity of the system resorting to such practices.

Determining whether a given sanction is socially acceptable thus requires reference to the values a given society places on individual and collective welfare.

Before examining the question of values, discussed in the following section, it is appropriate to consider the factors affecting such judgments.

Individual Tolerance

It should be noted that the meaning of the term . torture » is subjective with respect to each and every individual victim. Whether treatment is viewed as « torture » depends on the man-

ner in which it is performed and the individual's tolerance to such treatment. For example, the reaction of different individuals to the same treatment may be very dissimilar. A given treatment, such as suspending a person by the hands for a certain number of hours, may produce less pain in a person of relative strength and good health than in a weaker individual (4). The quantum of pain produced will have a different impact on different individuals because of their varying individual tolerances for pain (5). Both considerations also depend on how the suspension is executed.

As a result, even objectively similar treatment of two individuals may result in one's experiencing severe pain, while the other experiences only minor discomfort. This would be particularly true in the case of treatment designed to produce mental suffering, because individual resistances to such stimuli are so particularly different (6). (See Appendix C, « Psychological Aspects of Torture »).

The Social and Cultural Context (7)

Another element of subjectivity in applying a universally uniform standard is largely dependant upon the social and cultural context in which the act in question occurs and the degree to which the observer has been conditioned thereto. Thus, in a societal and cultural context which accepts the concept of corporal punishment and where certain forms of physical harm is generally accepted, the pain or suffering incidental to carrying out such a form of punishment to which a person subjected is not socially perceived as being « severe » punishment and usually the individual does not perceive himself or herself as being subjected to « severe » pain and sufferance.

The conclusion is therefore compelling. Physical and psychological pain and suffering may or may not be deemed « severe » depending not only upon individual tolerance but upon its societal and cultural context because of the degree of its acceptability and its expectation by individuals. That which is viewed and perceived as « torture » in one context is not in another.

Conclusion

All of the factors discussed above may be crucial in determining how a society views a given form of treatment for prisoners. The difference between punishment that is considered just under retributive, incapacitative, deterrent or rehabilitative theories and that which is regarded as unjust is established with reference to these factors. Likewise, measures designed to discourage repetition of officially disapproved conduct will be classed as rehabilitation, behavior modification, brainwashing or dehumanization with reference to these factors.

Thus, it is with reference to these factors that the authority administering a given treatment to prisoners is judged. If the treatment is in accordance with societal views, the authority will be viewed as an agent of society toward normalization of behavior. But if the treatment is contrary to these views, the authority's integrity, reliability and stability will be questioned, as well as the integrity, reliability and stability of the institutions it administers.

In short, it is with reference to these factors that society may either judge the prisoner as deserving the treatment or judge the authority as an outlaw or a mechanism run amok.

Accordingly, a very high price may be paid by an authority that fails to consider these factors in formulating its policies for punishment.

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(1) *See, e. g.*, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G. A. res. 3452 (XXX), 9 Dec. 1975, wherein no attempt is made to distinguish between the types of treatment condemned.

(2) « The word 'torture' is often used to describe inhuman treatment which has a purpose such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment ». 12 *Yearbook of the European Commission of Human Rights, The Greek Case*, p. 186 (1969). Limiting use of the term to practices designed to aid in fact-finding for the judicial process was done by J. Langbein in *Torture and the Law of Proof* (1977). Applying the term to all measures of coercion or intimidation which involve infliction of severe suffering has been advocated by J. Lauret and R. Lassierra in *La Torture et ses Pouvoirs* (1973).

(3) *See, e. g., Tyrer v. U. K.*, Application No. 5856/72, Report of the European Commission of Human Rights, 14 Dec. 1976, wherein applicant argues that the practice of birching, a judicially imposed corporal punishment on the Isle of Man, constitutes a violation of Article 3 of the European convention, which prohibits torture and other forms of cruel, inhuman or degrading treatment or punishment.

(4) *See*, Langbein, *supra* note 2 at 8-9.

(5) *See, e. g.*, Timmerman and Sternbach, « Factors of Human Chronic Pain: An Analysis of Personality and Pain Reaction Variables », 184 *Science* 806 (1974).

(6) *Id. See also*, « Science and the Sources of Pain », 106 *Science News* 261 (1974), and D. Colligan, «New Science of Torture», 80 *Science Digest* 44 (1976), and J. Hardy, H. Wolff and H. Goodell, *Pain Sensations and Reactions* (1967) at 386-87.

(7) *See*, A. Bozeman, *The Future of Law in a Multicultural World* (1971), ix *et. seq.*, 3-33, for a general analysis of the difficulty of determining the role of law in the future because of the diverse societal and cultural settings.

SECTION III

Values and Torture

A. - The Significance of Values in Decision-Making

As outlined in Section II, a critical factor in determining the validity of a given coercive process, in view of the consequences causes, are the values of the society within which it occurs. For the purposes of this study, values may be regarded as the worth, merit or import ascribed to various social and individual interests. A system of values is the relative interrelationship of individual and social interests to which worth, merit or import is ascribed.

A system of values is shaped by the collective ideals, attitudes, customs and habits of members of that society which are manifested by assigning or ranking priorities of the attributes deemed important to the individual and to social interaction. The sum total of these considerations results in the development of intrinsic common standards based on subliminal moral, ethical, epistimological or social policy oriented considerations.

Ultimately this process leads to the acceptance or rejection of a given practice on the basis of its impact on those interests whose standing has been ranked by social consensus. Accordingly, an examination of which practices deserve to be labeled « torture » requires reference to the values of a given society which in turn, necessitates careful consideration of how these values are shaped and how they may be brought to bear on a particular practice. At the outset, one should be aware that the relativity of values depends on the contextual juxtaposition of diverse social and individual interests to which different worth is ascribed. Thus, while values in the context of an inquiry about « torture » may appear to refer exclusively to the individual human interest sought to be protected, they are also very significant in those instances where such interests are in conflict with other social interests.

This problem of conflicting interests and their corresponding assigned values requires consideration of four issues:

1) The function and potential impact of values;

2) The distinction between individual values and social values;

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3) The distinction between social values at the national level and social values at the international level; and

4) The relationship of the values asserted in condemnation of torture to those asserted in rationalization for torture.

B. - Individual Values and Value Theory

Values, rights, and moral principles are intimately related concepts and yet require clear separation and definition in order to understand the great leaps of progress and subsequent retrogression of the World Community in dealing with human rights on an international scale (1). Since values and the valuing process are the basic tools with which people create and maintain moral-legal system, it is appropriate to consider values and moral structures as such before looking more closely at particular values reflected in international human rights documents and the mechanisms of their implementation.

A value may be thought of as a centrally important belief or judgment about either conduct (how one should or should not behave) or goals (whether particular end-state are worth or not worth having) (2). Thus, values can be subdivided into those which are instrumental (modes of conduct) and those which are terminal (end-states) (3). Being honest and working hard are varieties of conduct values while peace and security exemplify end-states. To a limited extent, knowledge of terminal values alone such as « peace » is sufficient to predict behavior, i.e., participation in peace marches (4).

Applying these concepts to torture, instrumental values would include respect for human dignity, compassion, patriotism and obedience to superior orders. Terminal values would include individual integrity, freedom from suffering, public order and governmental stability. The first two terminal values are predictive of behavior antipathetic to torture, whereas the latter two could be viewed as predictive of behavior supporting torture.

Values do not operate on individuals in a unitary and static manner. Rather, an object value such as « freedom » is seen in a particular context of situation such as « state of National emergency ». Were these object and situation variables unitary and highly interdependent, there would be little surface inconsistency in behavior. However, both aspects, object-values and situation-values are arranged in hierarchies which are shaped and limited by cultural, institutional and social factors (5). Whether an individual places personal liberty above police protection in a hierarchical value system will depend on the security of the societal situation. Alternatively, where one places personal obedience to the law in a value hierarchy depends on the society's application of the law over all members in an equitable manner (6).

In the context of torture, such a hierarchical ranking could be decisive: one might be for or against torture based on whether one holds individual integrity more important than public order or *vice versa.*

Given the organization of values into hierarchies of object and situational importance, it is readily apparent that as values are considered imperative to action, a study of the evaluating process requires a constant balancing of the underlying hierarchies of action alternatives and social situation ([7]). Such a theoretical frame-work permits a working hypothesis that people do not act contrary to their values. Rather, if an individual acts inconsistently with one superficially obvious value, it means that he has acted in accord with another which overrode the former in importance in the specific context. One must merely identify the object value in the particular situation with which behavior is consistent ([8]).

It is possible, however, to introduce into an individual's value system contradictory values. Such change can be induced by providing new information, altering ideological and political positions, or introducin changes in the operating environment of an economic or technological character ([9]).

Where the new information is such that a value inconsistent and irreconcilable with an accepted value emerges, the person endures a state of cognitive dissonance ([10]). Dissonance occurs when one element follows functionally from the contrary of the other. For example, if an individual traditionally values reasoned deliberation in decision making and he is confronted with the desirability of spontaneity in the same situation, he will endure a degree of cognitive dissonance proportional to the importance of the dissonant elements in the relationship.

Such dissonance could arise where the public order is severely threatened so that persons who highly value individual integrity become absorbed with the need for pragmatic action against « enemies » of public order, possibly including torture to learn the plans of such « enemies ».

States of dissonance have motivational properties reflected in the tendency to reduce dissonance when it occurs. A person will attempt to justify commitment to a value to a degree proportional to the amount of discrepant information ([11]). (That a person tends to bring his cognitions into correspondence with impinging reality is a fundamental assumption underlying dissonance theory.) According to Rokeach, it is generally accepted that in order for change in values to occur there must first be a state of cognitive inconsistency or cognitive dissonance. Therefore, when change has occurred, one may look at the anterior values for those elements of dissonance which produced the change. An extreme discrepancy, however, between end values

and contingent instrumental values produces great cognitive strain which requires cognitive reorganization and at a certain level creates withdrawal from the system of valuation itself. Thus, concepts as broad as defections from religion or national Marxism can be considered under the rubric of value theory ([12]).

While the locus of evaluation in the « mature » individual remains with that individual, the valuing process itself is fluid and flexible depending on the context of the moment ([13]). When values are considered as inherently benefit-oriented, the usefulness of this fluidity (as opposed to rigidity) in the valuing process becomes clear. Nonetheless, values are reasonably stable instrumentalities for reasoning about benefits ([14]). As Rescher ([15]) has said, the whole structure of value rests ultimately on what is beneficial to the individual.

C. - Individual and Social Values

1. - *Distinguishing Between Individual and Social Values*

Individuals acquire values through a process of identification with models, initially their parents. As they develop, they become increasingly capable of accepting value-models from outside the family ([16]). West ([17]) has stated that man, as a domestic animal, identifies with his community once that community is defined and through that identification acquires community values. A value becomes a value of society, i.e., generally diffused throughout the society, commonly through the successful promotion by a dedicated minority ([18]). When that value is held in common by a sufficient number of community members to be considered a shared conception of a desirable mode of conduct, it has become a societal value ([19]). According to Longman ([20]) « Values are the standards by which objects, persons, or actions are judged. Values define the nature of reality. Values then serve as regulatory mechanisms which enable societies to adapt to the environment and maintain those types of interpersonal relations conducive of the particular type of adaptation. Finally, values mediate the relation of the individual to society and, therefore there are strong emotional attachments... to the values of the group ».

While the expression « the values of society » is often used, it is important to keep always in mind that values do not exist in a vacuum but operate solely through the individuals who hold them. The fiction of a corporeal « society » as a being distinct from its members can be as obfuscating as that of the « State » as an entity totally distinct from the people who comprise it. As the State takes its life from its people, society derives its values from its members. However, although social values are derivative

of individual values of society's members, to become social values, individual values must be widely enough shared that they constitute a common interest.

In order for a society to function at an optimum level, it must place greatest emphasis upon common interest values such as justice, and equality while channeling competitiveness into institutionalized and harmless settings. Such is a rational social order ([21]).

The ramification of this principle in the field of torture is a tendency to emphasize the common interest value of public order while delimiting the degree of individual integrity consistent with social cooperation. The legal norms through which abstract values become guides to behavior regulate the individual's freedom with binding force only to the extent that they correlate with current value judgments within the society ([22]). Stone ([23]) sees the acceptance and observance of law. McDougal ([24]) is concerned with the protection and implementation of the community's goal values or end-states. He suggests that the laws of a State must be congruent whith the values of its constituents to preclude coercion.

A parallel arises with criminal law where it is generally assumed that conduct prohibited and sanctioned is essentially that which embodies social values.

Thus laws prescribing crimes traditionally reflect moral or social values ([25]), but in contemporary criminal law this matter is treated as a question of criminological policy rather than as enforcement of morality ([26]). The prohibition of torture is therefore an individual and social value, and also a social policy as discussed in Section V.

2. - *The Framework of Social Values*

Study of value structures within a society and within the larger World Community is an exceedingly complex task. McDougal, Lasswell and Chen ([27]) suggest that systems of identification of values today cross the monolithic unity of state parochialism, thus laying the basis of internationally perceived and recognized values. On the level of the individual, hierarchies of object and situation values acquired through identification interact in shaping both verbal and non-verbal behavior. Through a process of diffusion, values are transmitted throughout a society and find expression in the legal documents of the State. Beyond the States are regional and global organizations which are attempting to identify and ultimately protect basic human hights. That these rights are not derived from the State but inhere in the human condition is fundamental to the very existence of human rights at the level of international law ([28]).

One technique which simplifies such an overwhelming task

is the theoretical framework of moral development initially suggested in the work of Piaget ([29]) and more fully developed by Kohlberg and Kramer ([30]). If one accepts that humanistic values become organized into moral systems which are subsequently codified in legal documents, then one can reverse the process and unpack these concepts. That is, legal documents can be understood in terms of their underlying moral structure which rests upon humanistic values. Kohlberg and Kramer ([31]) through extensive cross cultural research have developed a model of moral development which is useful in analyzing the practical problems in human rights implementation.

Piaget ([32]) found through his study of childhood development that moral judgment, the practice and consciousness of rules, progresses in predictable and inevitable stages. Although all individuals do not progress at the same rate or reach the same ultimate stage of moral judgment, they all progress through the same order of irreversible sequential stages. Kohlberg and Kramer ([33]) have demonstrated that different social classes and different societies reach and customarily encourage different modes of moral analysis even though values such as « human liberty » are common to all. Three levels each containing two stages comprise the Kohlberg and Kramer system ([34]). At the base is the Pre-Conventional Level consisting of Stage 1: The punishment and obedience orientation ,and Stage 2: The instrumental relativist orientation. In the former stage, goodness or badness is determined by the physical consequences of the act. There is no underlying moral order here supported by punishment and authority but only the consequential punishment itself. Slightly more advanced is the second stage in which human relations are viewed in a physically pragmatic way involving a hedonistic reciprocity. Still at this level no abstract values such as justice, loyalty, or human dignity are involved.

At the Conventional level, « maintaining the expectations of the individual's family. group, or nation is perceived as valuable in its own right, regardless of immediate and obvious consequences » ([35]). Stage 3: The interpersonal concordance or « good boy-nice girl » orientation is the first of the two Conventional stages. The Conventional level culminates in Stage 4: The law and order orientation involving fixed rules, respect for authority, and the maintenance of the social order for its own sake. The authors have demonstrated that both cross culturally and across lines in the United States, moral development usually fails to progress beyond these Conventional stages ([36]).

The third level is designated « Post-Convention, Autonomous, or Principled Level » and contains Stage 5: The social-contract legalistic orientation and Stage 6: The universal ethical principle orientation ([37]). At Stage 5, individual rights and standars which

have been critically examined and agreed to by the entire society define right action. Rights are matters of values and those values are clearly viewed in relativistic terms. Free agreement and contract are the binding elements of obligation. Changing the law on the basis of rational consideration of the social order is quite possible and there are procedural rules for reaching consensus. This is the « official » level of moral functioning of the American government and Constitution.

Finally, Stage 6 defines right on the basis of individual conscience in accord with self-chosen ethical principles which are universal, consistent, and logically comprehensive. « At heart, these are universal principles of *justice*, of the *reciprocity* and *equality* of the human *rights*, and of respect for the dignity of human beings as *individual persons* » ([38]). These are abstract ethical principles such as those contained in the Preamble to the UN Charter ([39]). Only transiently are a relatively few individuals capable of operating at this level although a universal ethical sense is recognized by contemporary cultural anthropologists ([40]).

D. - Social Values at the World Community Level

Consideration of the position of States and supranational organizations in relation to these stages of moral development demonstrates the asynchronous development of the concept of fundamental personal liberty. As Stone ([41]) suggests, the path of human survial is an untidy process of compromise and adjustment.

Unlike the higher levels of moral development, the Conventional level, in particular Stage 4, consists of fixed rules and the rigid maintenance of the social order. Stage 3 is equally rigid in that the stereotypical majority is seen as « natural » order. Kholberg and Kramer ([42]) have demonstrated that most people function at Stages 3 and 4. Therefore, one can see clearly the relevance of the emphasis of McDougal, Lasswell and Chen on the use of persuasion rather than coercion both in domestic and in international decision making. These authors recommend that when a change of values is desirable, the members of the group should be persuaded to select an alternative mode of conduct maximizing the probability of gain at low cost ([43]). Their study focused principally upon the State « decision-maker » in the World Community. They emphasized that this authoritative figure must act in harmony both with the fundamental objectives of the community for which he or she speaks and with genuine shared expectations of the international community ([44]).

This requirement translates into the context of torture as an admonition against interferences with individual integrity

that violate fundamental community objectives or the genuine shared expectations of the international community.

The rigidity of the Conventional stages of moral functioning is characteristic of most individuals throughout the world. However, McDougal's constitutive process which shapes and is shaped in turn by authoritative decision making allows for change by means of uniquely innovative and socially responsive individuals. While the press of the human condition is toward higher levels of moral development, the inertia of the individual acts as an effective governor on the rate of development. In sequential stages of development, no stage may be skipped altogether but the process itself may be accelerated. It is to this acceleration that McDougal's concern bears great relevance. To that extent it is valid to conclude that world community expectations as reflected by individual and national concern with torture rises to the level of international cognizance.

E. - Torture, Values and the World Community

The foregoing discussion has demonstrated that values begin at the individual level, evolve into greater commonality and achieve recognition as social values which are then embodied into laws or other collective manifestations.

This evolution then progresses beyond the national level to attain ultimately the international level when the commonality factor is shared by multiple world societies.

The practice of torture represents a value which, reflected in the laws of various societies by its prohibitions explicitly or implicitly in the laws of virtually all states (see Appendix I). Accordingly, it is appropriate to focus on rejection of the instrumental or conduct-oriented value of torture and the rise of the contrary values which reject the practice of torture.

At the international level, such values may attain legal effect by becoming general principles of international law accepted by civilized nations. Such general principles are evidenced by the behavior and attitudes of nations on the domestic plane and on the international plane. On the national plane, such behavior and attitudes may be reflected in constitutions, laws and judicial decisions (see Appendix I and II and Section VI C2). International behavior and attitudes are reflected in treaties, United Nations declarations or resolutions, decisions of the International Court of Justice and writings of noted publicists (see Section VI, especially C1 and Appendix II).

The express or implied prohibition of torture in treaties adhered to by states covering all geographical areas of the world are the expression of consciousness of internationally perceived social values.

Thus, the value of individual integrity has been placed above any rationalization of public order where the conduct of torture is concerned.

F. - Basic Values that Torture Offends

It is obvious that torture is in conflict with the value of individual integrity. The existence of this value is incontrovertable. It is manifested in religious doctrines, philosophies, cultural forms, national constitutions, laws, and jurisprudence, in international treaties, custom, general principles of law recognized by civilized nations, resolutions and declarations of the United Nations and in the writings of noted scholars.

The contradition between torture and this value is undeniable.

Less obvious, perhaps, is the contradiction between torture and other major social values such as: the integrity of the legal process and the integrity of the political process. These contradictions are somewhat obscured by the claims of advocates of the practice of torture that torture is necessary for the workings of legal process or necessary to preserve the political process. Thus, they argue that torture serves a role in protecting social values against those who seek to destroy them.

An examination of these arguments reveals that, rather than protecting these social values, the practice of torture is actually destructive of them.

The infliction of torture is a drastic interference with individual integrity. Less drastic interferences with individual integrity, such as arrest and imprisonment, are resorted to by authorities acting on behalf of society only where such measures are prescribed by criminal law. It is reasonable to assume that a more drastic interference with individual integrity would require a basis at least as compelling. It is therefore appropriate to consider the basis provided by criminal law for interference with individual integrity.

In all systems of criminal law two values are asserted as guiding the formulation of proscriptions and the application of sanctions. These are the values of the integrity of the legal process and of integrity of the existing political process by which society governs itself, either as preservation of the *statu quo* or as preservation of the political process by which transition is to be pursued.

1. - *Integrity of the Legal Process*

Throughout the history of the twenty-one recorded civilizations of the world ([45]), every society has striven to establish a

legal process whose vitality was essentially linked to the integrity of that process (46).

Although preservation of integrity of the legal process may be related to preservation of the integrity of the individual, it is also a distinct issue meriting independent consideration.

Thus, most legal systems would rather allow a guilty person to go free than to risk punishing an innocent person in doubtful cases, and many legal systems deny admissability to evidence obtained through particularly abusive means or altogether prohibit self-incrimination (47). Therefore, the use of torture to secure a conviction by obtaining otherwise unavailable incriminating evidence is usually contrary to the law and in addition thereto, it violates the integrity of the legal system (48). The reason is that the integrity of the legal system is indispensable to its credibility and acceptance and thus ultimately to its survival as the effective means of resolving inter-personal and social conflicts. Accordingly, torture cannot be rationalized as a means of sustaining the legal system because it is violative of the integrity of the legal system.

2. - *Integrity of the Political Process*

Invariably any system of government whatever its form either seeks to perpetuate itself or establishes ways and means for its evolution (49). Accordingly, the use of torture to alter such an existing political process violates its integrity in addition to violating certain laws pertaining thereto. This applies to instances where torture is used to preserve or alter the political process. Thus torture constitutes a depradation of that process no matter for what purpose or objective it is used.

The integrity of the political process is a social value which torture affects and violates in much the same way as it affects and violates the integrity of legal process.

G. - Values in Conflict

Arguments against torture and rationalizations for its practice are frequently presented in the form of a grading or hierachy of conflicting values. Thus it is advanced by opponents of torture that the values of personal integrity ranks in priority above all other values and should therefore be inviolate. A contrary position holds that social interests and public order tower above all personal matters. Wherefrom the conflict between the two positions when those who believe that the supremacy of the collective interest however perceived justifies under certain circumstances the resort to such « necessary » sick means as torture. The dilemma is not new in law. The most common examples

being those in which shipwreck survivors have sacrificed one of their number so that others might survive. The rationalization is obvious and the arguments on either side have been forcefully marshalled by legal philosophers in many legal system (50).

Invariably, however, the result has been to subordinate either the value of the individual to that of the larger unit. However that analogy and its outcome fails to satisfy the divergent views of social philosophers on the subject, particularly when the competing interests are not only those of a small group of people but of a substantially larger one, or when the counterpart is the nebulous « public interest » or « public order ». Philosophically, one can say that the argument of justification in such cases rests on the doctrine of necessity in criminal law, even though the differences between philosophical schools of thought vary (51).

Aristotle distinguished between absolute and hypothetical necessity, the first referring to « that which is », and the latter to « that which is to be » (52).

The criminal law of most legal systems observes this distinction, conditioning its requirements in accordance with the fact that « human conduct implies decision, initiative, action and not mere reaction, but at the same time, it is always more or less influenced by external conditions. Hence: 'with regard to the things that are done from fear of greater evils,... it may be debated whether such actions are voluntary or involuntary' » (53) or justified by reason of the fact that they were not really freely willed. Necessity however, is always viewed as the product of exigent circumstances which were not created by the person claiming to have been the reason thereof (54). Equally required is the proposition that the actor had no other suitable choice. One cannot therefore see how the doctrine of necessity could be argued in justification of torture since the perpetrator of torture is not compelled by circumstances and cannot argue that an alternative to this violation is unavailable. It may however, be argued that the course of conduct of the perpetrator of torture was not only necessitated by circumstances but was compelled by the prior conduct of the victim of torture. The analogy here would be to the doctrine of coercion or duress (55). In this line of argument proponents of torture advance that it is a last resort method when all other means of preventing a greater harm to others have failed or are no longer available. The example offered is in the case where an explosive device was put in a place likely to kill and injure a significant number of people and no time is available to discover where it is hidden. This example is analogous to similar ones which had been offered in opposition to the prohibition of torturing prisoners of war under the Geneva Convention of August 12, 1949 for the protection of prisoners of war. Then the argument was that military necessity justified

such acts, and that if the enemy could harm ones own soldiers and that harm could be averted by discovering certain pertinent facts then the use of torture was justified coercion. Both examples are false characterizations of the issue of competing and not conflicting values whose coexistance is not mutually exclusive. Two sets of reasons are advanced for this conclusion. One relates to military conflicts and is simply that of mutuality of humanitarian interests. What one side can do to its enemies so can the other, and none would be better off therefore. Consequently the preservation of the value of personal integrity lessens the dehumanization effect of conflict without impairing either side's interest. The other set of reasons applies to the non-military example. In addition to that of mutuality of interests and humanitarianism, it is the lack of reliability of the information derived from torture; the fact that its obtention by such means violates certain laws; that it violates the integrity of the legal process; and that a legal process whose integrity is tainted looses credibility and effectiveness; and the cumulative effect of these incidences erodes the integrity, credibility and viability of the political system which permits or tolerates such a practice.

The two sets of reasons advanced purposely avoid meeting head on the philosophical dilemma of conflicting values, because values such as individual integrity and public interest or public order should not be framed in conflicting terms. Rather they should be viewed as complementary values which are not mutually exclusive but coexistant. That their concurrent coexistance should be viewed from the more objective perspective of social policy rather than the subjective one of philosophical abstractions. Surely if the latter approach would be followed exclusively there would come a point in the analysis where the choice would be made on moral values which could either be difficult to explain or unconvincing to those whose differing values oppose it. The end result would be that the side with the greatest capacity to enforce its argument would prevail. Thus in addition, reliance on values in opposition to torture it is advisable to approach the question from a social policy perspective where values are one of the many considerations which can be taken into account to oppose torture as an undesirable and inadvantageous practice in addition to it being offensive to human and other social values.

The following section undertakes such an analysis and offers insights into the validity of these arguments.

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(1) Rescher, *Introduction to Value Theory* 122 (1969).
(2) Rokeach, *Beliefs, Attitudes and Values* 124 (1970).
(3) *Id.* at 160-61.
(4) *Id.* at 169.

(5) *Id.* at 161. *See also,* Murphy, « Ideological Interpretations of Human Rights », 21 *De Paul L. Rev.* 286 (1971).

(6) *Id.* at 135.

(7) R. Tisdale, *Psychological Value Theory and Research: 1930-1960* 168 (1961).

(8) Rokeach, *supra* note 2 at 128.

(9) Rescher, *supra* note 1 at 116.

(10) Festinger, *A Theory of Cognitive Dissonance* (1957).

(11) J. W. Brehm and A. R. Cohen, *Explorations in Cognitive Dissonance* 300 (1962).

(12) Rokeach, *supra* note 2 at 194.

(13) C. Rogers, « Toward a Modern Approach to Values: the Valuing Process in the Mature Person », 68 *J. Abnorm. Soc. Psychol.*, 4-5 (1964).

(14) Rescher, *supra* note 1 at 109.

(15) *Id.* at 133.

(16) A. DeWolfe, « Identification and Fear Decrease », 31 *J. Consult. Psychol* 259 (1967).

(17) R. West, « A Plea for a Rational Approach to the Problem of War and Peace », 16 *U. Chi. L. Rev.* 390, 393-94 (1948-49).

(18) Rescher, *supra* note 1 at 118.

(19) L. Longman, « Dionysus - Child of Tomorrow », 3 *Youth and Society* 80-88 (1971).

(20) *Id.* at 87.

(21) Rescher, *supra* note 1 at 100.

(22) S. Stone, *Legal Controls of International Conflict* 35 (1974).

(23) *Id.* at 30.

(24) M. McDougal and F. Feliciano, *Law and Minimum Public Order* 121 (1961).

(25) *See, e. g.,* P. Devlin, *The Enforcement of Morals* (1965), but *see contra,* H. L. A. Hart, *Law, Liberty and Morality* (1936), Hughes, « Morals and the Criminal Law » 71 *Yale L. J.* 662 (1962), and J. S. Mill, *On Liberty* (Everyman ed. 1859). *See also,* M. C. Bassiouni, *Substantive Criminal Law* 355 (1978).

(26) *See,* Bassiouni *supra* note 25 at 358.

(27) McDougal, Lasswell, and Chen, « Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry », 63 *Amer. J. Int'l L.* 237, 239 (1969).

(28) *Yearbook on Human Rights for 1966* 437 (New York: United Nations, 1969).

(29) Piaget, *The Moral Judgment of the Child* (1948).

(30) L. Kohlberg and R. Kramer, « Continuities and Discontinuities in Childhood », in *Personality and Socialization* 336 (D. Heise, ed., 1972).

(31) *Id.* at 337 338.

(32) Piaget, *supra* note 29 at 3.

(33) Kohlberg and Kramer, *supra* note 30 at 344-46.

(34) *Id.* at 338-340.

(35) *Id.* at 339.

(36) *Id.* at 334-335.

(37) *Id.* at 340.

(38) *Id.* at 340.

(39) The Preamble of the Charter of the United Nations says in part « we the People of the United Nations Determined... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small... ».

(40) M. Mead, *Twentieth Century Faith, Hope and Survival* (1969) at 31.

(41) Stone, supra note 22 at xi.

(42) Kohlberg and Kramer, « Continuities and Discontinuities in Childhood Moral Development » at 344-45.

(43) M. McDougal, H. Lasswell, and S. Miller, *The Interpretation of Agreements and World Public Order* 13 (1967).

(44) *Id.* at 29.

(45) A. Toynbee, *A Study of History* (10 Vol. 1934-1954).

(46) *See,* R. David, *Les Grands Systemes de Droit Contemporains* (1973); J. Imbert, G. Sontel and M. Boulet-Santel, *Histoire des Institutions et des Faits Sociaux* (2 vols. 1957), and Bassiouni, « A Survey of the Major Criminal Justice Systems in the World », in *Handbook of Criminology* (D. Glaser ed., 1974).

(47) *See, e. g.,* Bassiouni, *supra* note 46; H. Jescheck, *Die Untersuchungshaft in Deutschen, Auslandischen und Internationlen Recht* (1971) and G. O. W. Mueller and F. LePoole Griffiths, *Comparative Criminal* Procedure (1969). *See also, Analytical Summary* by United Nations Secretariat, U. N. Doc A/10158 (1976).

(48) Bassiouni, « The Privilege Against Self-Incrimination: A Historical Analysis and Contemporary Appraisal » in *Law in the United States of America in Social and Technological Revolution* (J. Hazard and W. Wagner ed., 1974).

(48) Bassiouni, « The Privilege Against Self Incrimination: A Historical Analysis and Contemporary Appraisal », in *Law in the United States of America in Social and Technological Revolution* (J. Hazard and W. Wagner ed., 1974).

(49) *See, e. g.,* M. C. Bassiouni, *The Law of Dissent and Riots* (1971).

(50) *U. S. v. Holmes,* 26 Fed. Cas. 36 (E. D. Pa. 1842); *Regina v. Dudley and Stevens,* 14 Q. B. D. 273 (1884); H. Schadewaldt, *L'odyssee du « Radeau de la Meduse »* (1816), Graven, « 'L'Etat de Necessite' Justificatif des Naufrages », 2 *Revue Internationale de Criminologie* 19 (1969); and *e. g.,* R. Merle et A. Vitu, *Traite de Droit Criminel* (1966), P. Bouzat et J. Pinatel, *Traite de Droit Penal* (1969); H. Jescheck, *Lehrbuch das Strafrecht* (1973); S. Renneberg, *Strafrecht - Allgemeinerta!* (1976).

(51) Quoted and discussed in J. Hall, *General Principles of Criminal Law,* (2d. ed. 1960) at 419 *et. seq.*

(52) Fuller, « The Case of the Speluncuian Explorers» 62 *Harv. L. Rev.* 616 (1949).

(53) O. W. Holmes, *The Common Law* (1887) at 48.

(54) M. C. Bassiouni, *Substantive Criminal Law* (1978) p. 459-61.

(55) *Id.* at 458.

(56) *See supra* note 48, and *Regina v. Dudley and Stevens,* 14 Q. B. D. 273 (1884).

(57) Hall, *supra* note 49 at 426.

(58) *People v. Lovercamp,* 43 Cal. App. 3d 823, 118 Cal. Rptr. 110, 115 (1974).

SECTION IV

A policy oriented analysis

The prerequisite to formulation of social policy, based on maximization of values, is examination of the components of the phenomenon (1). The components of the contemporary practice of torture are discussed below.

A. - Perpetrators of Acts of Torture

1. - *Military Forces*

Although, as shown in Section I, the military profession has not been historically strongly linked with the practice of torture, in recent decades military forces have been identified as frequently securing the custody of victims, intelligence tasks identifying individuals to be subjected to torture, and interrogating and inflicting suffering upon detainees, in time of war, in states of emergency, and even in periods of relative tranquillity (2). Military involvement in such activity may be traced in part to the current tendency in some parts of the world to respond to threats to the status quo by declaring states of seige or emergency in which the scope of powers relating to national security is greatly enlarged and armed forces become involved in a broad range of law enforcement activities (3).

2. - *Constabulary and Police Forces*

Because taking and maintaining custody over an individual is necessary for torture, it is not surprising that law enforcement agencies, which routinely perform such functions, are often utilized in obtaining and holding torture victims. It follows that such forces would be utilized in the actual process of torture (4).

It is also clear that, where torture occurs without sanction of high authorities, torture is likely to occur in the hands of law enforcement forces, because they are the chief group having actual and immediate control over individuals. Although such police involvement classically occurs in a domestic context, it sometimes occurs in the context of war, where occupied territory is administered by non-military agencies of the occupying power (5).

3. - *Other Perpetrators*

Torture has apparently occurred in the hands of vigilante groups, terrorist and revolutionary groups and professional intelligence gathering or state security organizations ([6]), indicating that a military or quasi-military character is not a requirement for an agency to indulge in such practices, and that such practices may occur in the absence of official authority.

Moreover, specialists in a wide range of skills have been pressed into service by those groups practicing torture, including doctors and other medical personnel, technicians in electronics and other fields, and psychologists ([7]).

4. - *Assessment*

It is clear that the class of potential perpetrators of torture is without limit. Absent deterrent factors, almost any person or group could indulge in the practice if it were believed that some pragmatic goal would be attained by such conduct.

B. - Victims of Torture

Contemporary accounts suggest that torture may be directed against a very wide or very narrow class of persons in varying contexts.

1. - *Political Categories*

A group occupying a position of power may seek to maintain its status by directing various forms of coercion against persons of a hostile political viewpoint, or those suspected of holding such views through torture of such persons or of persons associated with them. Targeted political viewpoints may be those hostile to the entire institutional, political structure of society or merely ostile to a particular group. Targeted groups may be characterized by opposition to a particular policy or personality through established institutional means, through the media or mass demonstrations, or through campaigns of violence.

2. - *Suspected Criminals*

At times victims of torture are both politically hostile and guilty of specific criminal offenses such as espionage, conspiracy to commit murder or theft. That is, they may have acted out of political motivation and their actions may have furthered political goals, but some of their actions constitute classic common crimes. A frequent example is the terrorist engaged in a campaign to overthrow the existing political order. As in the case of political opponents, such targeted groups may in fact be coerced

through torture of suspects or of persons somehow associated with such groups ([8]).

At times, torture victims are common criminals, such as armed robbers, murderers, and assassins. It should be noted that the purposes or goals associated with the torture to which this class of offenders is subjected are often very specific and distinctive.

3. - *Seemingly Random Individuals*

At times the selection of victims appears to be completely arbitrary, suggesting that virtually any individual is a suitable target. Such randomness appears most frequently in situations of general repression where the perpetrators of torture are associated with a power seeking to establish or regain position, such as in a system of reprisalys by an occupying army.

4. - *Other classes of Victims*

Circumstances are sometimes important in causing a particular class of persons to be targeted for torture. Thus, in war, persons of either military or civilian status may be tortured if they have fallen into enemy hands. Sometimes such persons are coerced through torture of persons associated with them.

5. - *Assessment*

The potential class of victims of torture is limitless. Political events, war and other circumstances could bring the possibility of torture to individuals of groups previously secure. Accordingly, if there is no deterrent to the practice of torture, no one can be guaranteed that he or she will not become a torture victim.

C. - Goals

As the variety of classes of victims suggests, the practice of torture is engaged in for a variety of goals, some of which are associated particularly with certain classes of victims. These goals may be grouped as tactical or ultimate.

1. - *Tactical Goals*

The immediate result sought by torturers is commonly coercive. That is, to either: obtain information, obtain a confession or other statement with legal or political usefulness, or to intimidate the victim or another person ([9]).

Another class of goals may be described as punishment. The goal of punishment may be characterized by the status of the practice of torture vis-a-vis official policy. Where torture is pursuant to an official policy, its goal may be either: to act as a deterrent to continued conduct of the kind engaged in by the

offencer, or by others; or to fulfill the retributive theory of punishment's requirement that the offender suffer. Where torture is practiced without regard to or in defiance of official policy, its goal may be personal vengeance on the part of the torturer or sadistic gratification for the torturer.

Punishment as a goal of torture tends to be restricted to the various classes of criminal victims, whereas the other goals may be paired with any class of victim. Moreover, pursuit of one goal is not exclusive of pursuit of other goals, since torture may serve all these goals at once. It is in fact difficult to limit the goals served by the practice, since they are all served by any act which serves one.

2. - *Ultimate Goals*

Ultimate goals tend to follow from tactical goals. Where a coercive tactical goal was sought, the ultimate goal will generally deal with the application of the products of the coercion-information, confessions or statements.

Thus, information obtained may be used to destroy enemies of the torturer's superiors or to check an attack upon them. Likewise, a confession may be used to incriminate either the victim or his associates, thereby making it possible to punish them; and, perhaps, serve other purposes such as neutralizing the threat they pose to the group responsible for the torture. Statements obtained through torture are capable of use for imprisoning or discrediting individuals.

Ultimate goals arising from coercive tactical goals may be characterized as:

a) to preserve a political system;
b) to preserve the political power of a particular group;
c) to dislodge a group holding political power;
d) to avert a threatened harm of any kind.

Torture with punishment as its immediate goal may be aimed at the ultimate goal of maintaining public order pursuant to the deterrent theory of punishment, or satisfying unofficial urges of vengeance and sadism which are both immediate and long-term goals for those inflicting torture.

3. - *Assessment*

The practice of torture can be rationalized as advancing a wide variety of pragmatic considerations. Its drastic nature and the consequent fear makes it a potent force for coercing individuals or groups into compliance with the torturer's will.

D. - Motivation of the Torturer

The goals of torture tend to delimit the motivation of the group that practices it, but the motivation of the individuals who

actually apply torture or order its application merits further considerations.

The deliberate infliction of severe pain or suffering upon another human being is not an activity that most individuals find easy to contemplate, much less to indulge in. Individuals who do so may be motivated by either circumstantial or personal pressures.

The most dramatically demonstrated circumstantial motivation is that of response to authority. Thus, an amazing percentage of apparently psychologically average persons will inflict such pain simply because someone in apparent authority has told them to do so ([10]). It is easy to imagine how much more readily obedience to such orders will follow where an individual has been conditioned either to respond to orders, as in a military environment, or to over look the suffering of others.

A more difficult concept is mass or mob psychology. This phenomenon is evident where there is universal and emotional condemnation or fear of the class of persons targeted as victims of torture. The torturer, by peer pressure has either come to see them as subhuman or to imagine the peril to his compatriots so vividly that the acts of torture are justified by an unconscious bending of means to ends.

The personal motives of sadism and vengeance have been suggested from their concommitant goals, but a more subtle motivation also exists: self-righteousness. Thus torture may be practiced by a person who is simply taking the law into his or her own hands.

Assessment

Although inflicting pain on other human beings is repulsive to most persons, torturers are not lacking. Decision-makers are removed from the grisly task and keep their eyes focused on the practical advantages they seek to derive from torture. Subordinates are conditioned to obey orders, and can be conditioned to perform the tasks required.

E. - Methods

No purpose would be served by cataloging all the various devices and techniques applied to produce severe pain of suffering. However, it is important to consider some of the most sophisticated and subtle techniques in current use. All of them have in common certain psychological aspects discussed in Appendix C.

1. - *Physical Methods*

Historically, physical methods of torture have included sleep

deprivation, deprivation of food and water, exposure to noise or to extremes of heat and cold, forced squatting or mantaing other uncomfortable positions, electric shock, water torture, various forms of beatings such ah the *hastinado* in which the soles of the feet are beaten and the *pau da arrara* or parrot's perch in which a suspended victim is beaten.

Beyond the hardware of historical torture, drugs have come to play a role. Among these drugs are a variety that produce physical effects, such as convulsions and other losses of bodily control, and sensations of pain ([11]). Their special significance is that they can be administered with a minimum of equipment or facilities.

2. - *Psychological Methods*

a) Standard Methods

Many of the practices long in use by torturers are directed more at the mind than the body, and are of significance because such methods are difficult to detect and easy to apply. Examples of these practices are prolonged verbal abuse, threats such as threats of beatings, sexual assault, exposure to vile animals, and actual sexual assaults, homosexual rape, as well as mock executions, prolonged hooding and solitary confinement.

b) Chemical Methods

Most drugs in the torturer's tool chest are directed at the mind. Some are straightforward, even non-painful, such as various truth drugs. Others are designed to produce psychic anguish or distressing disorientation ([12]), so that, rather than directly causing the victim to speak or perform a desired act, the threat of their renewed use serves to coerce such behavior. Again, such methods are easy to apply and difficult to detect.

c) Advanced techniques

As the progress of Science has had such distressing side-effects as enhancing destructive power in warfare, it has also enhanced the potential for distortion of minds, a fact of which torturers have shown studious awareness. Thus such concepts as « brainwashing », until recently regarded as an emotional and exaggerated term, and behavior modification, thought of as a force for untwisting bent minds, take on a real and sinister meaning. Their greatest significance is probably in their potential, long-term effect on the victim and the fact that they are difficult to distinguish from techniques for rehabilitation of criminals or curing of mentally ill persons ([14]).

3. - *Special problems regarding Medicine*

Such practices as witholding needed medical treatment,

performance of experimental surgery and the like are difficult to classify because pain is not necessarily a part of such techniques and they generally involve the body while aiming at psychological impact.

4. - *Assessment*

The methods of torture have three important ramifications.

First, they are flexible so that torture can be inflicted by trained or untrained persons, can be done in a variety of environments or locations, and can be done without leaving traces on the victim. This makes it difficult to predict or trace the likely perpetrators of torture or their places of activity.

Second, as methods become more sophisticated and less physical, torture becomes less obviously objectionable on its face. The absence of blood, broken bones and screams makes the decision to resort to torture easier to rationalize.

Third, torture methods are sometimes modeled after contemporary means of rehabilitative treatment. This makes torture more difficult to define as well as more difficult to detect.

F. - Outcomes of the Practice of Torture

1. - *Short-term*

a) Intended

The intended short-term outcome of torture is simply the realization of the tactical goals of the torturer: coercion or punishment.

b) Unintended

i) Incidental outcomes

Notwithstanding the goals of the torturers, some results not specifically sought may occur. Out of callousness or preoccupation, the torturer may not anticipate or care about these results, but their potential importance to all involved may be very great. For example, the victim may be permanently disabled mentally or physically ([15]). Or the torturer may simply fail in his efforts to coerce the victim and not obtain the information, confession or statement sought.

On the other hand, the torturers themselves may be affected in unexpected ways. They may become callous, or more so, toward all human suffering or less conscious of human dignity in any person, including themselves ([16]).

ii) Contrary to Intent

Torture may also have effects opposite to those desired by the torturer. The victim may give false information that leads

the torturer's compatriots to waste resources or embarrass themselves. Or, instead of intimidating a victim who may actually have been incorrectly suspected of involvement with the targeted class, it may embitter him against those on whose behalf the torturers act. Moreover, it may motivate not only the victim but also his compatriots to take more desperate action to escape, avoid capture or destroy the torturer's group. The victim may die quickly, or commit suicide thus depriving the torturers of any chance to obtain his cooperation by any means whatever.

At the same time, the individuals assigned to perform the torture may experience revulsion toward their task and therefore resentment toward their superiors; or they may experience a destruction of their moral principles that renders them unprincipled henceforward, in dealings with their compatriots.

2. - *Long-term Outcomes*

a) Intended

Intended long-term outcomes are, of course, realization of ultimate goals.

b) Unintended Results

i) Incidental results

The incidental results of the practice of torture may include the following:

1) Pushing the targeted class to desperate measures of resistance;

2) Polarization of society by posing difficult moral questions and forcing the population to take one side or the other. This is particularly appropriate where the targeted class is very large or ill-defined;

3) Causing a general sense of public insecurity due to demonstrated unprincipled action by leaders or apparent arbitrainess of their action;

4) Encouraging ruthlessness and brutality among compatriots of the torturers, resulting in brutalization of the population generally.

ii) Results Contrary to Intent

As unsettling as the incidental results may be, other possible long-term results are directly threatening to the torturer's cause. Torture may cause the class of potential victims to:

1) Resort to greater force to avoid capture;

2) Become more dedicated than before, either pragmatically or out of desire for vengeance, to destruction of the group engaging in torture; or,

3) Provide the torturer's enemies with a new propaganda weapon: reports of torture which generate sympathy for the victim and contempt for the torturers and which may glorify those tortured as martyrs.

Torture may also adversely affect members of the group engaged in its practice by:

1) Leading to erosion of moral commitment and respect for authority on the part of lower-ranking members;

2) Development of an attitude that « might makes right », which encourages a testing of relative strength by persons and factions among them; or,

3) Revulsion by subordinates to the policies of their leaders, leading to the resistance to orders or efforts to overthrow these leaders.

The public-at-large may be affected in ways contrary to the interests of the t[illegible]rers, such as development of sympathy or admiration of vic[illegible]s, and of rejection of the practitioners; emigration based on fear of involvement on either side in the continuing confrontation; or action to and the policy of torture or to overthrow those who practice it.

Finally, interests not at first perceived may be involved. For example, if neither the victims nor the torturers included government officials, the government may be motivated by the torture to step up its efforts to assert control over its domestice affairs, focusing on eradication of the practice or of group engaging in it. On the other hand, if the government of a state is responsible for torture, there may be such international repercussions as utilization of mechanisms for implementing various international legal prescriptions protecting human rights and proscribing torture; withdrawal by other states of aid or support to that government; or support of rivals of the government based on the belief that:

a) The victims of torture are morally deserving of support; or

b) That the government engaging in torture is ripe for overthrow because its resort to such a practice indicates weakness or desperation and its use of such methods has destroyed its claim to popular support, sympathy, or legitimacy.

Looking further ahead, if the government is responsible for torture and these adverse reactions lead to its overthrow, an outcome could be trial by the new government of those responsible for engaging in torture.

3. - *Assessment*

It is clear that, although there is a possibility that torture may secure certain short-term pragmatic goals, it may also result

in short-term outcomes that are harmful to various values af individuals and society, including those torture is purportedly used to advance or protect, such as public order.

Moreover, the ultimate outcome of torture is likely to be destruction of the value in whose name it is practiced: public order. Use of torture may result in moral decay, revolution or even invasion.

Conclusions

It is apparent that torture is a practice that could quickly spread if its use were not deterred. Short-sighted pragmatists would order its infliction and helpless subordinates would carry it out.

It would be difficult to detect after the fact and difficult to foresee who would perpetrate it and who would be its victims.

Clearly, torture is a cancer that could engulf nations, or even the World Community in its entirety, if left unchecked.

There are those who argue that the practice of torture should be, if not unleashed, un-muzzled, so that this extreme interference with individual integrity could be resorted to in certain situations where public order is so seriously threatened that the harm to individual integrity would be preferable to the harm threatened to the common good, public order.

But, upon reflection, it is clear that ultimately the practice of torture not only defiles individual integrity but also constitutes a grave threat to the very value it claims to serve: public order.

Accordingly, there is no basis for justifying torture under any circumstances. Its « virtue », if their be any, is far outweighed by its vices.

On the contrary, torture is a threat to the values held by the World Community and must be eradicated. To do so, it must be clearly proscribed in all contexts and corners of the globe and effective means must be found to implement this proscription.

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(1) *See,* M. McDougal and F. Feliciano, *Law and Minimum Public Order* at 121 (1961) and McDougal, Lasswell and Chen, « A Framework for Policy Oriented Inquiry », 63 *Am. J. Int. L.* 237, 239 (1969).

(2) Amnesty International, Report on Torture (1975) hereinafter cited as *Amnesty Report* at pp. 106, 143, 153, 182, 246; *See also,* « Commentary: Military Regimes in Latin America », 17 *Rev. Int'l Com. of Jurists* 13 (1976) and *Crimes of war* pp. 239 et. seq., 265 *et seq.* and other selections (R. Falk, F. Kloko, R. Lifton eds. 1971).

(3) *E. g., Amnesty Report* at 158 and 246.

(4) *E. g., id.* at 134, 125 Morocco, at 125. *See generally,* Council of Europe, *Convention for the Protection of Human Rights-Case-law Topics-Human Rights in Prison,* s 14 (1971).

(5) *E. g. Amnesty Report* at 234.
(6) *E. g., id.* at 151-152, and *generally* at p. 241.
(7) *E. g., id.* at 188-189 and Chicago Comm'n of Inquiry into Status of Human Rights in Chile, *Report* at IV, 11 (1974). *See also,* Mesch, « Human Rights, Chile and International Organizations » 24 De Paul L. Rev. 999 (1975).
(8) *E. g.,* id. at 215, 217 218.
(9) *E. g.,* id. at 34.
(10) *Id.* at 67-68. *See also,* P. Deely, *Beyond Breaking Point: A Study of the Techniques of Interrogation* (1971).
(11) *Amnesty Report* at 55.
(12) *Id.* at 41-55.
(13) *See, supra* note 10.
(14) *See, supra* note 7.
(15) *Amnesty Report* at 58-62.
(16) *Id.* at 63-68.

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SECTION V

Examination of Existing Legal Prescriptions

The status of torture under contemporary international law is determined by reference to the four generally recognized sources of international law: treaties, custom, general principles of international law as recognized by all civilized nations, and the writings of noted publicists (1). Inquiry into the jurisprudence of both national and international tribunals is also valuable since judicial decisions reflect analysis of the source of law, applicable to their tribunals, by those officially qualified to do so... judges.

A. - Prescriptions found in treaties

1. - *Treaties governing armed conflict*

The Geneva Conventions of 1949 proscribe torture in their common article 3 categorizing it as a grave breach (2) and listing the specific prohibitions (3). In addition, the Additional Protocols to the Geneva Conventions reinforce these prohibitions. Article 11 of Protocol I and Article 5, Paragraph 2 (e) of Protocol II prohibit interference with the health or mental or physical integrity of persons interned, detained or deprived or liberty (4). Articles 6 and 7 of Protocol II, governing penal prosecutions and protection and care respectively, are of particular interest.

Although the applicability of the Conventions is limited to contexts of armed conflict, the conflict need not be international in character (5). It is unclear what degree or character of domestic violence constitutes « armed conflict » and therefore brings the Conventions into effect (6), but the degree of protection beyond such minimum standards as freedom from torture depends, in certain circumstances on the modus operandi of the non-governmental side of the struggle, in such matters as uniforms, openly carrying arms and the like (7).

Thus, in connection with an armed conflict, signatories to the Geneva Conventions (8) are prohibited from any acts constituting torture against any nationals not their own, whether innocent civilians, prisoners of war, or persons acting on behalf of an opposing armed force not qualifying as prisoners of war, such as spies or saboteurs.

2. - *Treaties not restricted to armed conflicts*

a) Universal treaties

i) The United Nations Charter and the Universal Declaration on Human Rights

The Charter of the United Nations contains a number of references to human rights ([9]) but only in the most general of terms, so that the duties of the members as signatories of the Charter are vague when reference is had only to the Charter itself. Much clearer is the language of the Universal Declaration of Human Rights ([10]), which was procedurally born as a resolution of the General Assembly of the United Nations. Unlike other General Assembly resolutions, however, the Universal Declaration has been interpreted as having a binding effect because its principles have achieved such a degree of acceptance that they now constitute general principles of international law recognized by all civilized nations ([11]). The Declaration's prohibition is in Article 5, which states, « No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment ».

ii) International Covenant on Civil and Political Rights

Only slightly less universal is the International Covenant on Civil and Political Rights ([12]), which exists not only as a General Assembly resolution, but also as an international agreement. Its Article 7, states: « No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation ». Clearly binding upon its signatories, the Covenant may have some legal effect on conduct of non-signatories who are members of the United Nations, due to its dual status as both convention and resolution ([13]).

b. - Regional Treaties

i) *Europe*

Open to signature by all members of the Council of Europe, the Convention for the Protection of Human Rights and Fundamental Freedoms ([14]) states in Article 3, « No one shall be subjected to torture or to inhuman or degrading treatment or punishment ». This prohibition is clearly binding on signatories ([15]).

ii) *Americas*

The American Convention on Human Rights ([16]), open to signature by members of the Organization of American States, prohibits torture in much the same language in its Article 5, section 2; « No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent

dignity of the human person ». This prohibition is *also* clearly binding on its signatories ([17]).

3. - *Assessment of Treaty Prescriptions*

a. Clarity on what is proscribed

Although « torture is forbidden under the Geneva Conventions and additional protocols to them, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European and American Covenant on Civil and Political Rights, and the European and American human rights conventions, none of these instruments provides a definition of 'torture' » ([18]). As discussed above, under Section III; the concept of torture is sufficiently clear for there to be general agreement that certain conduct constitutes torture, yet sufficiently relative that other acts may be regarded in different ways by different observers or legal systems. Thus, the absence of a definition of torture in these instruments is certainly unfortunate, unless some amplification of the meaning of the term can be found in other sources of international law.

b. - Scope of application

i) *Those Regulating Armed Conflicts*

The prohibition in the Geneva Conventions of 1949 against torture may be loosely said to apply to armed conflicts. However, the concept of what constitutes an armed conflict is not easily delimited, and the Conventions themselves leave the term without clear definition. The Additional Protocols contain more specific language, making such provisions applicable in all struggles for self-determination ([19]), but also apparently restricting their application in other conflicts not involving two or more states, by requiring that the non-state forces control identifiable territory and possess an organization sufficiently sophisticated to implement the Conventions ([20]).

Thus, the scope of application of the Geneva Conventions can be defined only with reference to two rather vague concepts: wars of self-determination and control of territory by insurgents. The former is often clear, but in such cases as secessionist struggles, it is often difficult to apply. The latter may be difficult to apply where insurgent activity is clandestine and insurgent territory is more readily identified by absence of government forces than by the manifest presence of insurgents.

It has been urged that, with respect to the provisions of the Geneva Conventions prohibiting torture and other inhumane acts, that applicability should be presumed, because no harm will result from their observance to the party doing so. However, so long as governments regard torture as a useful tool for breaking

the envelope of secrecy protecting insurgent activities, such governments will doubtless regard loss of this tool as harmful, and will take advantage of the vagueness of terminology in the Conventions and Protocols to argue against applicability of their anti-torture provisions whenever possible.

ii) *Other treaties*

Other international conventions regarding human rights are of general application and derogations from their standards are possible only where other provisions specifically permit them. Thus, when Greek military rulers claimed that instability in Greece necessitated certain restrictions on human rights, they cited language in the European Convention permitting derogation in such circumstances ([21]). With regard to torture, however, derogation would seem impermissable in all circumstances, and the likelihood that such a rule would be pronounced by the European Court doubtless contributed to the decision of Greece to withdraw from the Convention before the adjudication of charges of torture against it was completed.

The same would apparently be true of other human rights instruments, but withdrawal of some of the *procedural* guarantees of human rights would apparently be permissable in cases of national emergency, and such withdrawal would make detenction of torture more difficult while creating greater opportunities for it to occur.

B. - Prescriptions found in custom

1. - *Custom relating to armed conflicts*

Custom, as a source of international law, must be regarded as distinct from treaties or general principles of international law recognized by civilized nations. However, the existence of a custom is frequently demonstrated by reference to treaties or such general principles. The distinction to be preserved is that custom consists in a course of conduct pursued for a significant time based on a belief that such conduct is required as a matter of law. Thus a state may refrain from torture simply because it has no occasion to use it, or it may sign a treaty denouncing or proscribing torture, or it may express its intent never to resort to torture. However, none of these establishes a customary prescription against torture unless there is the added factor that the state in question believed its actions were required as a matter of international law ([22]). This point merits repetition because it is crucial in establishing the difference in significance between the Geneva Conventions, discussed in A (1) above, and the Hague Conventions ([23]), which are pertinent to custom. The former, which have been characterized as « humanitarian law » ([24]) rely

fundamentally on their contractul character as treaties, which sovereign states consented to obey and upon which they are therefore binding. In contrast, the Hague Conventions, while incidentally obtaining the same contractual effect, are not based on a premise of creating new international obligations upon its signatories. Rather, they were intended to provide a clear and tangible embodiment of principles of international law already binding upon all states, whether potential signatories or not ([25]). For this reason, the Hague Conventions are usefully labeled « the law of war » ([26]), because they are not bodies of principles created out of humanitarian concern, but principles evolved over the millennia.

Thus, the principles embodied in the Hague Convention on the Laws and Customs of Land Warfare are strong evidence of the underlying, universally applicable customary international law, from which they are purportedly derived. Furthermore, the number of states signatory to that Convention is not merely an indication of the number of states contractually bound by it, but also evidence of both the correctness of these principles and their universality ([27]).

Among these principles are: Article 4, which states that prisoners of war must be treated with humanity; Article 13, which states that persons accompanying opposing forces are entitled to the same treatment when captured as prisoners of war; Article 43 which states that an occupying power is obligated to take measures to restore public order; Article 44, prohibiting forcing the population of an occupied territory to provide information concerning its own army; Article 46 states that « Family honour and rights, the lives of persons and private property... must be respected »; and Article 50 states that, « No general penalty... shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible ».

Neither the provisions relating to prisoners of war, nor those relating to civilians expressly forbid torture, but the provisions clearly indicate that civilians are entitled to a higher degree of protection than prisoners of war, and since these latter are to be treated with humanity, it follows that torture is implicitly forbidden against these classes of individuals.

A remaining category, spies, is treated in Chapter II, of which Article 30 states no punishment shall be inflicted without a fair trial. Although not conclusive, this general reference to « punishment » and a « fair trial » would seem to forbid torture, since it is a form of punishment in the broader sense of the word, and because the generally accepted concept of a fair trial precludes torturing the accused to obtain evidence. A narrower interpretation of « punishment » could, however, exclude torture

done only to obtain information, so that it could be argued that spies are not protected from torture for such purposes.

Thus, the customary international law governing warfare would seem to proscribe torture against all or nearly all classes of nationals of other states. The failure to clarify the relatively vague language in the Hague Conventions may be due in large part to the shift to reliance on the Geneva Conventions, which cover many of the same matters in considerably greater detail, and which enjoy nearly universal adherence. The question thus arises whether the Geneva Conventions themselves have evidentiary significance as to the customary international law governing armed conflicts, at least insofar as they supplement the general pronouncements of the Hague Conventions. Valid and important as this question may be, its merits are difficult to assess. Whereas the Hague Conventions were a restatement of customary international law, the Geneva Conventions were approached with concern for what law ought to govern such conflicts. At times the Geneva Conventions restate the underlying law; at other times they change it without indicating clearly which purpose was being served.

The vagueness in the Hague Conventions can, however, be mitigated by reference to the actual conduct of states in implementing these general pronouncements. Such an inquiry reveals clearly that torture of civilians and prisoners of war has not been a declared policy of states in the past several centuries ([28]).

2. - *Crimes against humanity*

Aside from reference to widely accepted treaties, the existence or non-existence of a rule of customary international law involves an empirical analysis of the conduct of nations over a period of time and of the rationale for such conduct. An authoritative effort at such an analysis was made by the Nuremburg International Military Tribunal. This was done, for example, with the concept of crimes against humanity in the Frick Case ([29]).

This already enormous task was further complicated in two ways: First, the Tribunal was bound by its Charter, which was drafted with different considerations in mind; second, the Tribunal had available an alternative ground for dealing with charges under the heading of crimes against humanity, a law passed by the post-war interim government, so that such offenses could be handled as domestic matters ([30]).

As a result, the Tribunal's consideration of this issue is unclear. It may be summarized as deciding that, in view of its charter, the tribunal would consider only crimes associated with the conduct of the war ([31]), and that crimes against humanity could be viewed as including actions taken against German nationals

by German nationals despite the lack of a clear proscription against such conduct in the Hague Conventions ([32]). Such a conclusion would constitute recognition of a principle beyond the Hague Conventions.

However, in applying these principles to particular cases, the Tribunal made note of both the existence of a German domestic law as a potential basis for its decisions, and of the existence of non-German victims ([33]). As a result, the existence of a principle of customary international law protecting nationals from abuse by their own government, even in time of war, was not clearly established by these decisions.

The Convention on the Inapplicability of Statutes of Limitation to War Crimes ([34]) included torture among war crimes, but did not mention nationality of victims ([35]).

The matter of protection of nationals from their own government, even in time of war, remains unclear. But the existence of a principle of customary international law proscribing torture of nationals of hostile states is confirmed by the Tribunal's decisions and the Convention.

3. - *Assessment of Customary Prescriptions*

As discussed above, the codification of the customary law of warfare in the Hague Conventions omitted express mention of the word « torture ». Likewise, the concept of torture as a « crime against humanity » was not established by the International Military Tribunals, since they relied on language in the London Charter of 1945 referring to « ill-treatment » as a war crime and to « other inhumane acts » as crimes against humanity. Thus, the decisions of these tribunals provide no enlightenment on the meaning of the term « torture ».

The customary prohibition against inhumane acts in the context of armed conflict provides no definition of armed conflicts, thus leaving the scope of its applicability open to argument.

C. - General Principles of Law Recognized by Civilized Nations Relative to Torture.

1. - *As evidenced in United Nations Documents*

a) General Assembly Resolutions

Although the contractual legal effect of United Nations resolutions is disputed ([36]), they are useful as evidence of the existence of a principle of law recognized by civilized nations-the large number of nations voting in favor of such resolutions is an indication of acceptance of the principles embodied in such resolutions.

Of particular importance are five General Assembly resolutions, adopted since 1973, relating to torture, against which not a single negative vote was cast. The first, entitled « Question of Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment » (37) « rejects » any form of such treatment.

A year later, another resolution, « Torture and other cruel inhuman, or degrading treatment or punishment in relation to detention and imprisonment » (38), reaffirmed this rejection and requested the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders to include in its elaboration of the Standard Minimum Rules for the Treatment of Prisoners (39), « rules for the protection of all persons subjected to any form of detention or imprisonment against torture and other cruel, inhuman or degrading treatment or punishment... ».

In 1975, the « Declaration on the Protection of All Persons From being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted (40). This declaration defined torture, characterized it as an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment, and condemned it as a « denial of the purposes of the Charter of the United Nations » and a violation of the Universal Declaration of Human Rights regardless of any threats to state security or public order. In addition, it stated that, « Each State shall, in accordance with the provisions of the Declaration, take effective measures to prevent torture... » and amplified the measures to be taken.

An accompanying resolution (42) requested the Commission on Human Rights to study the question of torture and propose any necessary steps to ensure effective observance of the Declaration, to formulate a body of principles for the protection of all persons under any form of detention or imprisonment on the basis of the Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile and the draft Principles attached to it (43). The resolution further requested the Committee on Crime Prevention and Control to elaborate a Code of Conduct for Law Enforcement Officials. It also invited the World Health Organization to consider relevant principles of ethics for medical personnel.

In 1976, a resolution, (44) which encouraged diligence in implementation of its earlier requests to sub-agencies, and which included torture in the provisional agenda for its thirty-second session.

Finally, as this report was being compiled, the General Assembly approved a draft resolution based on a draft submitted October 28, 1977, calling on the Commission on Human Rights to draw up a convention against torture and other cruel

inhuman or degrading treatment or punishment. U. N. Doc. A/C.3/32/L.13.

b) Documents of United Nations Agencies and Other Global Institutions.

The Standard Minimum Rules for the Treatment of Prisoners ([45]), is the oldest of pertinent documents prepared and approved by U. N. agencies and is of crucial importance because it was made an integral part of the definition of torture ([46]). These rules describe both permissable and impermissable modes of treatmente, proscribing in particular « Corporal punishment, punishment by placing in a dark cell and all cruel, inhuman or degrading punishments... as punishments for disciplinary offenses » ([47]). An anomaly in the rules rendered them inapplicable to some classes of persons who were subjected to detention or for other restrictions on their liberty but had not been charged or convicted of any crime. This situation has been remedied, so that the rules now apply to all such persons ([48]).

A second document, The Draft Principles Relating to Freedom from Arbitrary Arrest ([49]), provide, inter alia, that, « No arrested or detained person shall be subjected to physical or mental compulsion, torture, violence, threats... » ([50]).

The Draft Code of Conduct for Law Enforcement Officials, approved by the Economic and Social Council ([51]) provides in Article 5, « No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency as a justification... ».

The ethical principles for medical personnel referred to in General Assembly Resolution 3453 (XXX) are under study by the Council for International Organizations of Medical Sciences, a non-governmental organization established by UNESCO and the World Health Organization ([52]). However, the matters has already been addressed by the World Medical Association ([53]), which declared that doctors « shall not cooperate condone or participate in the practice... shall not provide any premises, instruments, substances or knowledge to facilitate the practice... (nor) be present during any procedures during which torture is used or threatened ».

Finally, the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights is drafting Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment ([54]). These principles take the form of procedural safeguards designed, inter alia, to prevent such mistreatmente as torture by providing

for rights to communicate with family, counsel and the outside world generally, a right to medical examinations, and a policy of prison and detention center inspections.

2. - *National Constitutions and Legislation*

The existence of a general principle of law recognized by civilized nations can also be established or refuted by an empirical analysis of the attitude of states toward torture. This rather difficult and time-consuming task is made somewhat easier by compilations of relevant laws by the United Nations Secretariat ([55]).

The information contained in these documents comprises responses by a total of 83 states to one or more of four questionnaires relating to human rights of persons subjected to any form of detention, and is sometimes organized by state and sometimes by topic. It is not necessary to itemize the responses of these states to support the observation that their constitutions and laws provide general protection of detained persons from any from of torture under any circumstances. The laws of most states provide for punishment of any official engaging in acts of torture and exclude from evidence in any trial of the victim any evidence obtained by such means. To illustrate this observation it is useful to consider the laws of a number of states most widely accused of engaging in torture, since it may be presumed that, if any states' laws are weak in this regard, states so accused would be among them. This is done without making any judgment as to the validity of the accusations.

One state, which has been the subject of a General Assembly Resolution ([56]), is of particular interest. According to the response submitted by that state ([57]), Legislative decree No. 1,009 of May 8, 1975 « increases the penalties applicable to any persons illegally exerting pressure on prisoners; they will be punished in accordance with the provisions of article 150 of the Penal Code or article 330 of the Code of Military Justice, whichever is applicable ». Also, Supreme Decree 187 of the Ministry of the Interior, promulgated January 30, 1976 provides for medical examination of prisoners as they enter or leave any place of detention.

Another state which, though not subjected to such official criticism, has been accused in various fora of permitting or encouraging torture of persons under detention ([59]) reveals that, « In accordance with its Criminal Code, a penalty of imprisonment or rigorous imprisonment for a term of one to five years and deprivation of civil and political rights (inhabilitacion especial) for twice the term of imprisonment shall be imposed on: (a) any public official who, in the performance of his duties

commits ill-treatment against a prisoner or subjects him to illegal constraints; (b) any public official who subjects the prisoners in his custody to severe or vexatious restraints (article 144 bis). Any public official who subjects the prisoners in his custody to any kind of torture shall be liable to imprisonment or rigorous imprisonment for a term of 2 to 10 years... (article 144 ter) ».

Another indication of national attitudes towards torture is provided by constitutional provisions guaranteeing the protection of certain human rights ([60]). In the constitutions of some states, the treatment of torture is clear and categorical. Torture is expressly forbidden in over 40 nations ([61]). For example, article 26 of the constitution of the United Arab Emirates provides: « No man shall be subjected to torture or other indignity » ([62]).

Typical examples of constitutional enactments which prohibit torture with less explicit proscriptions are those which employ the use of other terms. The guarantees in these constitutions take the form of « inviolability of the person » (U.S.S.R. Const. art. 127), protection from « cruel and unusual punishment » (U. S. Const. amend. VIII) or « physical or mental third degree » (Bahrain Const. art. 19 (d)), « physical and moral integrity » of persons (Brazil Const. art. 153), and « human dignity » (Egypt Const. art. 42). The Constitution of Senegal (art. 6) provides: « The human person is sacred... Everyone shall have the right to life and physical integrity under the conditions defined by law ». Well over 30 countries are in this category ([63]). Almost 20 states go so far as to outlaw specific forms of torture or coercive abuse. For example, Argentina proscribes flogging, Bolivia, extortion, and Egypt, scientific experiments ([64]).

Countries which limit or entirely prevent the use of the « product » of torture are 50 in number. The limitation is usually in two forms: the more general guarantee against self-incrimination (e. g., Canada Const. §2 (d), India Const. §20 (3), U. S. Const. amend. V) and the exclusion of evidence obtained by torture or coercive abuse (Philippines Const. §20, Sudan Const. art. 65, Turkey Const. art. 33) ([65]).

Surprisingly, nearly 100 nations provide for the assumption of exceptional powers during emergency situations or states of siege during which time all or some human rights guarantees are suspended. At least 70 clearly include the prohibition of torture among those rights which may be suspended. Several more states are unclear. Almost 20 nations *do not* include the prohibition against torture among those rights which may be suspended ([66]).

Finally, 35 nations have incorporated, either by reference or by ratification, international instruments guaranteeing human rights into their municipal law ([67]). Seventeen European states,

as signatories to or ratifiers of the European Convention on Human Rights, are bound by that Convention's article 3: « No one shall be subjected to torture or to inhuman or degrading treatment or punishment ». The constitutions of other (18) states have incorporated by reference the 1948 Universal Declaration of Human Rights. Hence they are bound by article 5 of that instrument: « No one shall be subjected to torture or to cruel, inhuman or degrading treatment ».

3. - *Assessment*

a) Clarity

i) *National Prescriptions*

National laws and constitutions, with few exceptions, do not proscribe torture by name. Rather, they proscribe maltreatment of prisoners, without defining that concept with precisions. This lack of a definition is doubly troublesome since it not only leaves doubt as to what is proscribed, but also invites an interpretation that maltreatment consists merely of conduct that is not duly authorized, which would have the converse interpretation that, if treatment is ordered through normal channels, it cannot constitute torture.

ii) *International prescriptions*

Only two documents of international organizations go beyond the bare mentioning of the term « torture ». The Standard Minimum Rules for the Treatment of Prisoners (hereinafter referred to as Rules) do not purport to define torture but some of the language in that document, indicating practices which are permitted and those which are not, give some shape to the concept, since torture, being forbidden, cannot comprise of permitted acts and may include some of the forbidden acts.

An outright definition is provided only in the Declaration on Torture which states:

« For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners » (68).

Because the Rules forbid corporal punishment, the above definition apparently would encompass any infliction of severe physical pain for the stated purposes, since no physically painful treatment would ever be part of punishment consistent with

the Rules. But mental suffering would be governed only by the requirement in the Rules that punishment not be cruel, inhuman or degrading, so that reference to these undefined terms is necessary in order to determine whether a given practice enjoys the protection of « lawful sanctions to the extent consistent with » the Rules.

Thus, the definition clearly prohibits physically, severely painful treatment for its stated purposes, and by virtue of its non-exclusive wording forbids similar treatment for related purposes. Practices that result in mental suffering, however, are forbidden only to the extent that they fail to coincide with lawful sanctions which are not « cruel, inhuman or degrading », whatever those words are understood to mean.

It may be concluded that the Declaration on Torture provides a useful definition, then. But as was discussed above, its status as a « general principle of law recognized by civilized nations » is not clear.

Another criticism of this definition may be that, although it is reasonably clear as to what is being prohibited, the scope of the prohibition does not necessarily coincide with what is generally identified as « torture ». For example, its prohibition of all corporal punishment would include such punishments as flogging, which, though widely condemned, have not generally been described as « torture » ([69]). Accordingly, it may be argued that, although the Declaration purports to define « torture », it is actually covering the full scope indicated by its title, encompassing « cruel, inhuman or degrading » practices as well.

b) Scope

i) *National Prescriptions*

Protections of human rights under national constitutions, legislation or administrative measures are often subject to suspension in time of external threat or internal instability ([70]). As stated earlier, such protective measures rarely take the form of specific prohibitions of torture, so that their suspension cannot generally be viewed as an authorization for torture. Accordingly, to the extent that torture is prohibited by national measures, this prohibition would appear to remain in force at all times unless specifically superseded. But elimination of parallel measures of protection may make incidents of torture more difficult to detect, while creating greater opportunities for implementation of such practices.

ii) *International Prescriptions*

Existing international prescriptions against torture do not by their terms provide for any limitation in their scope of application.

D. - Writings of Publicists

The fourth source of international law, writings of publicists, provides apparently unanimous support for the principle that torture is a forbidden practice. As noted in Section III, the Problem of Values, above, scholarly writers in the field of international law are in agreement on this point, and the only objection to their position comes from pragmatists in occupations whose emphasis is not on the scholarly study of law ([71]).

At this point, it is appropriate to reconsider the ideas put forth by publicists and discussed under Section III. It is clear that the thrust of authorities who disfavor torture is that such practices are inconsistent with the values contemporary society places on the individual and his integrity. Although some authorities attempt to distinguish between coercive maltreatment and non-coercive maltreatment, it is clear that the concept of individual value would militate against maltreatment, for whatever purposes. Various counterveiling values based on conceptions of the common good have been advanced.

Examined in this light, the anti-torture publicists appear to be saying two things, some saying both:

1) That coercive maltreatment is never justified; and

2) That certain forms of maltreatment are never justified, whether coercive or not.

Two difficulties remain, however, concerning these positions:

1) If all coercive maltreatment is to be forbidden, are not all punishments coercive in character?

2) How can one identify those forms of maltreatment that are so objectionable as to never be justified?

Those publicists who have condemned the practice of torture have been categorical in their condemnation, admitting of no general circumstances in which such practices would be permissable. A special circumstance, however, has been discussed under which necessity might justify torture where the degree of harm to the individual to be tortured would be limited, the torture would be likely to produce certain information, and such information is essential to avoid an imminent harm, no other means of averting it being available. This hypothetical has been roundly criticized, however, not only as an elevation of ends over means, but also as putting forth a situation unlikely to ever actually occur. Such criticism has emphasized the likelihood that there would be means to avert the threatened harm, such as evacuation of persons in jeopardy, and that torture is inherently incapable of « being likely to produce » reliable information within a short time period.

These arguments were dealt with in a telling fashion in 1972 by the United Kingdom in reports presented by a committee investigating interrogation techniques in use in Northern Ireland. The majority report concluded that the tecniques in question were justifiable as a measure of self-defense, whereas the minority report concluded:

« The blame for this sorry story, if blame there be, must lie with those who, many years ago, decided that in emergency conditions in Colonial-type situations we should abandon our legal, well-tried and highly successful wartime interrogation measures and replace them by procedures which were secret, illegal, not morally justifiable and alien to the traditions of what I believe still to be the greatest democracy in the world » ([72]).

E. - Jurisprudence

The relevance of jurisprudence to a survey of existing legal prescriptions is that, although judicial decisions do not, as such, constitute prescriptions, their interpretation of the prescriptions is strong evidence of their meaning and scope.

1. - *Jurisprudence of International Tribunals*

a) The International Court of Justice

The question of existence of norms of either customary international law or general principles of law recognized by civilized nations regarding human rights was presented to the International Court of Justice in the South West Africa Case (1966). Because the matter was dismissed on procedural grounds, no pronouncement on this issue was made but a number of members of the Court indicated a belief that the provisions of the Universal Declaration, whatever its original effect, had come to represent general principles of law recognized by civilized nations or a norm of customary international law ([73]). Were this view accepted, the Declaration's proihibition of torture would be binding on all states, whether U. N. members or not.

b) International Military Tribunals

As discussed in C(2) of this section, under customary international law, the International Military Tribunal at Nuremburg was presented with arguments on norms of international law proscribing such acts as torture as « crimes against humanity », but in deference to its Charter, the Tribunal's determination of this issue was oblique, so that the existence of such a prescription was recognized only in relation to conducting an aggressive war.

c) The European Commission and Court

The greatest value of decisions by the European Commission, and Court, on Human Rights, is their interpretation of the meaning of the European Convention. This in turn may be of relevance in determining the meaning of similarly worded prescriptions.

Two cases presented under the European Convention are of particular importance, the « Greek Case » (74) and the « Northern Ireland Case » (75).

The former presented the important question of what conduct by a state, with respect to violations of a human rights convention, would entail responsability of that state for such violations. Unfortunately, the case was mooted before reaching the Court by the Greek denunciation of the Convention, but the observations of and arguments before the Commission are noteworthy (76).

In Northern Ireland case, an equally significant issue was presented: What acts are sufficiently serious to constitute torture? Again, an extra-judicial factor prevented this issue from being fully litigated. The United Kingdom determined that it would not contest that issue and admitted that certain practices of British troops in Northern Ireland (77) constituted torture. This admission and its rationale are, however, valuable for their reflections on the elements of an act which constitutes torture (78).

2. - *National Tribunals*

a) United Kingdom

Though not a court decision, the minority report of the United Kingdom committee on interrogation techniques of British troops (79) deserves attention because its rationale, which was accepted by Parliament, is of a kind that might have been produced, and may in future be utilized, by a court. Its crucial feature is its starting point, that any interrogation technique touching upon the physical integrity of an individual requires legislative authority because it would constitute a criminal assault at common law. Such an approach reflects a point of view concerning the inviolability of the individual that may be regarded as general principle of law accepted by civilized nations.

Given that point of departure, the minority report found « necessity » to be the only ground for justification, then noted that admission of such a ground could lead to justification of even the harshest treatment. The difficulty of drawing the line between permissable, non-debilitating and impermissible, debilitating treatment was demonstrated by the varying tolerance of different individuals to abuse, leading inexorably to the conclusion that acceptance of such a justification would inherently

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create the danger of individuals being subjected to debilitating treatment ([80]).

b) Greece

The downfall of the military rule in Greece that had been responsibile for the situation resulting in accusations that Greece violated the European Convention, led to a series of trials of officials accused of responsibility for acts of torture ([81]). The chief significance of these cases is in their handling of issues of evidence and personal responsability for acts of others. The evidentiary issues are of interest primarily in the practical sense, but the issues of command responsibility and responsibility of persons obeying orders demonstrate the potential vitality of domestic human rights law that may at a given moment appear moribund due to flagrant disregard for them by the government.

c) United States

A jurisprudential concept of interest was produced by a U. S. court in a recent case involving the recovery of evidence in the form of drugs swallowed by a suspect by means of a stomach pump ([82]).

Under U. S. law, the issue was whether the evidence had been obtained in violation of the « due process: clause of the Fifth Amendment to the U. S. Constitution. The principle that was applied was whether the conduct of the law enforcement officials was « shocking to the conscience », a principle which is vague only until linked with a concept of the value of the individual and his integrity. The court had no difficulty in finding that the stomach-pumping was impermissible conduct.

3. - *Assessment*

a) Clarity

i) *International*

Only one case of an international tribunal has added any real substance to the definition of the term « torture », the Northern Ireland Case. The clarity and usefulness of this decision, however, is impaired somewhat by the fact that the issue as to whether certain conduct by British forces constituted torture, was decided by the European Commission, rather than the Court. Nevertheless, the determination that such relatively mild coercion as wall standing, hooding and sleep-deprivation constitute torture does add definition to the concept.

A second case before the European Court, though not styled as a torture case, may also be of use, because it deals with the closely related issue of inhuman or degrading treatment or punishment. However, the case, involving corporal punishment on the Isle of Man, is currently before the Court, so that for the

present, the only documentation available for the case is the memorial of the Commission ([83]).

ii) *National*

National adjudications have rarely dealt with the subtle forms of torture which may be difficult to categorize. Accordingly, no test of conduct has been developed for determining whether or not it constitutes an act of torture, although U. S. courts have presented the criterion of « shocking to the conscience » to identify acts violating the more vague standards of the U. S. Constitution. Such a phrase, however, is so subjective as to be of utility only within a narrow cultural context.

b) Scope

i) *International*

The concept of crimes against humanity, which arguably would embrace crimes of torture, was developed by the Nuremburg tribunals only in connection with the waging of an aggressive war. Thus, the applicability of this concept to torture in other contexts has not been authoritatively adjudicated.

Likewise, the issue of applicability of international conventions' prohibitions of torture despite situations of national emergency has never been squarely adjudicated by an international tribunal. But the Northern Ireland case, dealing as it does with the extraordinary circumstances in Northern Ireland, provides a strong indication that torture would be regarded as proscribed even in the gravest national emergency.

ii) *National*

The most prominent national adjudication of cases involving torture, where the scope of applicability of proscriptions against such practices was pertinent, is the series of Greek torture trials which followed the return of civilian rule in that nation. The existing state of emergency was not found to have affected the prohibition of torture.

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(1) These four classes of authority are in fact the sources of international law which the International Court of Justice, by Article 38 of its stature, is empowered to consult. I. C. J. Stat. Art. 38.

(2) Geneva Convention for the Amelioration of the condition of the Wounted and Sick in Armed Forces in the Field (hereafter Convention I), Art. 60; Geneva Convention for the Amelioration of the condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereafter Convention II), Art. 51; Geneva Convention relative to the Treatment of Prisoners of War (hereafter Convention III), Art. 130; Geneva Convention relative to the Protection of Civilian Persons in Time of War (hereafter Convention IV), Art. 147.

(3) Convention I, Art. 12; II, Art. 12; III, Arts. 14 and 17; IV, Art. 31.

(4) Protocols I and II, adopted June, 21, 1977, and opened for signature

that date. *See also,* M. C. Bassiouni and V. P. Nanda, *A Treatise on International Criminal Law,* vol. I, part II (1973).

(5) Convention II is particularly noteworthy in this connection. *See also* M. Veuthey, *The Guerilla in Humanitarian Law* 172 (1976).

(6) Protocol II, Art. 1, para. 2 « This Protocol shall not apply to situations of internal disturbances, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflict ».

(7) *See,* Article 4 of Convention III, and its liberalization through Article 44 of Protocol I.

(8) The number of signatories had already reached 61 by February 12, 1950, and as of Dec. 31, 1974, 138 states had ratified.

(9) Art. 55 states that among the « conditions of stability and well-being which are necessary for peaceful and friendly relations among nations », which «the United Nations shall promote» is «universal respect for, and observance of human rights and fundamental freedoms for all...».

Art. 56 states that all members pledge cooperation with the organization in the achievement of these purposes. Chapter X, the Economic and Social Council expands upon the United Nations concern for human rights. See also, Nanda, « Implementation of Human Rights by the United Nations and Regional Organizations », 21 *DePaul L. Rev.* 307 (1971).

(10) G. A. Res. 217 A (III), Dec. 10, 1948.

(11) *See,* Advisory opinion of the International Court of Justice on The Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (1970)», 1971 *I. C. J. Rep.* 16, paras. 129, 130, 131; and Schwelb, «The International Court of Justice and the Human Rights Clauses of the Charter», 66 Am. Int. L. 337 (1972). *See also,* Bitker, « Application of the United Nations Universal Declaration of Human Rights Within the United States», 21 *De Paul L. Rev.* 337 (1971). *Fujii v. State* (Cal. 1952), 242 P. 2d 617. In that decision, the Supreme Court of California stated that, although U. S. obligations under the U. N. Charter were not self-executing, the Charters's objectives merited the court's respect, and the Universal Declaration exemplified the Charter's humanitarian objectives. This is certainly the view of H. Lauterpacht, *International Law and Human Rights,* 427 (1950).

(12) G. A. Res. 220 (XXI), Dec. 16, 1966, effective May 23, 1976. Forty-six states have ratified the Covenant, and of these 16 had ratified the accompanying Optional Protocol.

(13) The legal effect of U. N. resolutions is a subject of lively debate. *See, e. g.,* V. Van Dyke, *Human Rights, The United States and World Community* 120 25 (1970), J. Castaneda, *Legal Effect of United Nations Resolutions* (1969), 13 M. Whiteman, *Digest of International Law* 544-52; R. Higgins, *The Development of International Law Through the Political Organs of the United Nations* (1963); Sloan, « The Binding Force of a Recommendation of the General Assembly of the U. N.», 25 *Brit. Y. B. Int'l L.* 1 (1948). *See also,* Bleicher, « The Legal Effect of Recitation of United Nations Resolutions », 63 *A. J. I. L.*

(14) Signed Nov. 4, 1950, effective Sept. 3, 1953, 213 U. N. T. S. 221. *See also,* Linke, « The Influence of the European Convention of Human Rights on National European Criminal Proceedings», 21 *De Paul L. Rev.* 397 (1971).

(15) As of Dec. 31, 1976, 18 states had signed.

(16) Signed Nov. 22, 1960, OAS T. S. No. 36. *See also,* Fournier, «The Inter-American System of Human Rights», 21 *De Paul L. Rev.* 376 (1971); Burgenthal, «The Revised OAS Charter and the Protection of Human Rights», 69 Am. J. Int. L. 828 (1975) and Nanda, *supra* note 9.

(17) Three states have ratified. The Convention is not in force.

(18) G. Draper, «The Judicial Aspects of Torture», paper presented to the Conference on International Institute on Humanitarian Law, 30 Aug. to 3 Sept., 1977, San Remo, Italy, at pp. 3-4.

(19) Contrast common article 2 of the Geneva Conventions of 1949 with paragraph 4 of Article 1, Protocol I.

(20) Contrast common article 3 of the conventions with article 1 of Protocol II.

(21) The claim, based on Article 15 of the Convention, is noted in the decision of the Commission in the First Greek Case, Application Nos. 3321/67, 3322/67, 3323/67 and 3344/67, *Denmark, Norway, Sweden and the Netherlands v. Greece.*

(22) *See generally,* J. Brierly, *Law of Nations* 51-62 (6th ed. H. Waldock, 1963).

(23) Of particular interest here is the Hague Convention on the Laws and Customs of Land Warfare, signed 18 Oct., 1907.

(24) J. Pictet, *Red Cross Principles,* 26-27 (1956).

(25) *See, e. g.,* G. Schwarzenberger, *The Frontier of International Law* 256-73 (1962).

(26) Pictet, *supra* note 24 at 27.

(27) Schwarzenberger, *supra* note 25.

(28) *See, e. g.,* «Instructions for the Government of Armies of the United States in the Field», (1863), also known as the Lieber Instructions, reproduced in D. Schindler and J. Toman, *The Laws of Armed Conflicts* (1973).

(29) 1 *Trial of Major War Criminals* 266-68 and 320-21 (1947). *See generally, History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948).

(30) *See, e. g.* argument of the Prosecution in the « Medical Case », 1 *Criminals Before the Nuremburg Military Tribunals* 909-15 (1950). The law in question is Control Council Law No. 10 (1946).

(31) *Id.,* arguments for the Defense, 915-25.

(32) *Id.,* arguments for the Prosecution, 909-15.

(33) *Id.,* at vol. II, Judgment, on jurisdiction of the Tribunal at 1/2.

(34) G. A. Res. 2391 (XXIII), adopted Nov. 26, 1968, effective Nov. 11, 1970.

(35) Veuthey, *supra* note 5, at 172.

(36) *See,* note 13 *supra. See also* Schwelb, *supra* note 11 and Bleicher, *supra* note 13.

(37) G. A. Res. 3059 (XXVIII), adopted unanimously, Nov. 2, 1973.

(38) G. A. Res. 3218 (XXIX), adopted by a vote of 125-0-1. (Zaire abstained), Nov. 6, 1974.

(39) *See* note 45, *infra.*

(40) G. A. Res. 3452 (XXX), adopted without vote, Dec. 9, 1975.

(41) Torture is defined in Art. 1, para. 1:

« For the purposes of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners».

(42) G. A. Res. 3453 (XXX), adopted without vote, Dec. 9, 1975. *See also,* Nanda, «Implementation of Human Rights by the United Nations and Regional Organizations», 21 *De Paul L. Rev.* 307 (1971).

(43) U. N. Publication, Sales N. 65 XIV. 2, *See* note 49 *infra.*

(44) G. A. Res. 31/85, adopted without vote, Dec. 13, 1976.

(45) Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1955), reproduced in its report, U. N. publication, Sales No. 1956 IV. 4; approved by resolution 663 (XXIV) of July 31, 1957 of the Economic and Social Council.

(46) *See* note 41 *supra.*

(47) Article 32.

(48) ECOSOC Res. 2076 (LXII).

(49) U. N. Doc. E/CN 4/1044. These principles have not been adopted by any organ of the U. N., but are important in that they formed a basis for further U. N. Action. *See,* note 42 *supra and* accompanying text. They were formulated at the direction of the Commission on Human Rights in 1962.

(50) Article 24.

(51) ECOSOC Res. 2075 (LXII), reproduced in U. N. Doc. E/CN 5/536 annex V, and U. N. Doc. A/32/138, annex 1.

(52) See, U.N. Doc. E/CN 4/Sub. 2/NGO/70. *See also,* Nanda, *supra* note 42, and Linke, « The Influence of the European Convention of Human Rights on National European Criminal Proceedigs », 21 *DePaul L. Rev.* 397 (1971).

(53) Declaration of Tokyo of the World Medical Association, Guidelines for Doctors Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment, adopted unanimously by the 29th World Medical Assembly, Oct. 10, 1975.

(54) E/CN. 4/Sub. 2/395.

(55) Of particular usefulness are U. N. E/CN. 4/Sub. 2/359 plus Add. 1-2; E/CN, 4/Sub. 2/374 plus Add. 1-3; E/CN. 4/Sub. 2/393 plus Add. 1; and A/10158 plus Add. 1.

(56) G. A. Res. 3448 (XXX), Jan. 16, 1976. In paragraph 1 it states that the General Assembly, «[e] expresses its profound distress at the constant flagrant violations of human rights, including the institutionalized practice of torture... which have taken place and, according to existing evidence, continue to take place in Chile ». For a general survey of torture, *see* Amnesty International, *Report on Torture* (1975).

(57) U. N. Doc. E/CN. 4/Sub. 2/374, pp. 8-9.

(58) A recent example was in the hearings before the U. N. Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Human Rights Commission, wherein the representative of Italy, Mr. Antonio Cassesse, cited reports by non-governmental organizations of human rights violations in Argentina and Uruguay, Aug. 24, 1977, Geneva.

(59) U. N. Doc. A/10158 Add. 1, p. 26.

(60) A. Blaustein & G. Flanz, *Constitutions of the Countries of the World* (1971), is the source for all cited or quoted constitutions.

(61) For a list of the countries whose constitutions specifically prohibit torture, *see* Appendix A (1).

(62) *See* Appendix A for the relevant provisions of the constitutions which utilize the word torture in expressly outlawing it.

(63) *See* Appendix A for a more exhaustive list of such countries and their constitutional provisions.

(64) *See* Appendix A (3) for a list of states in this category and for relevant constitutional provisions.

(65) *See* Appendix A (4) for a complete list of those states and relevant provisions.

(66) *See* Appendix A for a list of those states, and relevant constitutional provisions providing for exceptional powers.

(67) *See* Appendix A (6) for a list of those states; and relevant consti-

tutional provisions incorporating the Universal Declaration of Human Rights.

(68) *See supra* note 45. *See also*, Nanda, *supra* note 42; Fournier, «The Inter-American System of Human Rights», 21 *De Paul L. Rev.* 376 (1971) and Burgenthal. «The Revised OAS Charter and the Protection of Human Rights», 69 Am. Int. L. 828 (1975).

(69) For example, corporal punishment of young males is practiced on the Isle of Man despite adherence by the United Kingdom to the European Convention on Human Rights, whether this violates the convention is currently a question before the European Court. *See*, Application No. 5876/72, *Tyrer v. U. K.*

(7) *See*, discussion of National constitutions. Brazil provisions.

(71) For Legalistic view, *see*, e. g. L. Sohn and M. Galey, *New Aspects of the International Protection of Human Rights* at 23-24 (1977); G. R. P., « Torture and Other Violations of Human Rights as International Crimes », 17 *Rev.* Int. Com. Jurists 41 (1976); A. Robertson, *Human Rights in Europe* at 44-48; D. Poncet, *La Protection de l'Accuse par la Convention Europeen des Droits de l'Homme*, at 141 (1977); *Problems de Protection Internationale des Droits de l'Homme* (1969); J. Graven, *Le Difficile Progres du Regne de la Justice et de la Paix Internationales par le Droits* (1977); and L. Sohn and T. Burgenthal, *International Protection of Human Rights*, at 522, 1233-35 and 1366 (1973). The pragmatic counterpoint is presented in Section III B of this report. For a contemporary natural law approach, *see* J. Maritain, *Les Droits de l'Homme et la Loi Naturelle* (1942). The protection of human rights is discussed in H. Fragoso, *Direito Penal e Direitos Humanos* (1977). Although highly practical in purpose and function, the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in September, 1975, resulted in an airing of anti-torture views that is useful to consider under the topic of publicists. *See, e. g.*, Amnesty International *Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders* (1975), and J. Dolan and H. van den Assum, « Torture and the 5th U. N. Congress on Crime Prevention », 1975 *Rev. I. C. J.* 55.

(72) Amnesty International, *Report on Torture* (1975) p. 110.

(73) South West Africa Case, I. C. J. (1966). *See also*, Van Dyke, *supra* note 13. *See* especially Judge Tanaka's dissenting opinion, reprinted in I. Brownlie, *Basic Documents on Human Rights* 457 (1971). The Court has apparently adopted this view in its 1971 Advisory Opinion on South West Africa. *See supra* note 13, especially Schwelb at 349.

(74) Requests No. 3321/67, 3323/67 et 3344/67, treated jointly in « L'Affaire Grecque», Strasbourg (1970).

(75) Application No. 5310/71, *Ireland v. United Kingdom*, decided by the Commission Oct. 1, 1972. Also of potential interest is Application No. 5613/72, *Hilton v. U. K.* (1977), in which solitary confinement and other prison regime issues are raised.

(76) *See* particularly, *supra* note 74, vol. II, 2me partie.

(77) The techniques in question included hooding, exposure to noise, sleep deprivation, restricted diet and wall-standing.

(78) *See*, Memorial of the U. K., CDH (76) 44, at pp. 29-53, especially at 43.

(79) Report of the Committee of Privy Counsellors (Cmnd. 4901), March, 1972, minority report by Lord Gardiner.

(80) *See* 1972 Rev. Int'l Com. of Jurists, No. 8, at 17.

(81) These cases are abstracted in an Amnesty International publication, « Torture in Greece: The First Torturers' Trial 1975» (1977).

(82) *Rochin v. California*, 342 U. S. 165 (1952). *See also supra* note 11.

(83) *See supra* note 69.

SECTION VI

Examination of Existing Modes of Implementation

A. - National

1. - *Judicial Intervention and Safeguards*

Many countries, whether through adherence to the Universal Declaration of Human Rights, the International Convenant on Civil and Political Rights, other declarations of United Nations Resolutions, or by constitutional provision, prohibit torture or the imposition of cruel, inhuman ,or degrading punishment or treatment upon detained or arrested persons. However, interna tional instruments are, and necessarily so, very broad in an attempt to be as flexible as possible in order to adapt to the differing legal systems of the various countries: As such, these instruments may not afford the detained person the utmost protection from torture and inhuman treatment. Since such activities are carried out in secret and virtually never admitted to, more stringent and specific safeguards against its use are necessary. Fortunately, many countries, through their codes of criminal procedure, penal regulations, and other administrative rules, do provide detained persons such additional safeguards. The following are some of the safeguards currently in use in order to insure that such activities are not carried out.

a) Common Law Principles

States whose legal systems are of Anglo-Saxon common law heritage have a number of judicial remedies available for preventing or ending torture. As was noted in the earlier discussion of the problems of proof regarding torture, the practice of torture is most likely to occur in secrecy, so that the starting point for preventing the practice must be as close as possible to the time of arrest or commencement of detention.

i) *Grounds for arrest*

Under the common law, arrest is permissable only pursuant to a warrant issued by the judiciary upon a showing of probable cause (1) or when the person making the arrest has come upon the individual while he orshe was committing a crime or fleeing the immediate vicinity of the crime (2). By virtue of these require-

ments, judicial agreement is required for any type of dragnet attempt, so that the abuses of mass arrests and coercion as methods for determining which of many suspects is guilty, as described above in IV (B), are considerably curbed.

ii) *Arrest procedure*

Moreover, common law doctrine recognizes a right of individuals to resist any interference with their persons as a matter of self defense unless the person responsible for such interference is known to be acting under authority of the law ([3]). Law enforcement authorities are therefore obliged to identify themselves when making an arrest, lest they face justifiable resistance ([4]). As a result, secret arrests are curtailed.

iii) *Use of force and coercion*

Law enforcement personnel are justified in applying only that degree of force which is necessary to obtain or maintain custody of the individual ([5]). Use of force beyond such requirements may subject an arresting officer to civil or criminal liability ([6]). The same is true of jailers and prison officials ([7]). In addition, at least one common law state, the United States, requires pursuant to its Constitution, that persons subject to any form of detention must be advised of their rights to remain silent and to have the assistance of counsel in being questioned or in making any statements, and of the fact that any statements made can be used against them in legal proceddings ([8]). Failure to so advise a detainee may result in exclusion at trial of not only any statements made by him, but also of any evidence obtained pursuant to such statements. Moreover, even if a detainee has been so advised, any statements made by him in the absence of counsel once he has expressed a desire to have counsel present are subject to exclusion ([9]).

iv) *Communications by detainee*

The right to assistance of counsel includes the right to contact counsel promptly after arrest ([10]). Various protections also exist for a right of reasonable access through telephone calls, letters and visits from outsiders other than counsel ([11]).

v) *Conditions for continued detention*

The writ of *habeas corpus* is available to free any person detained for more than a short period without having been formally charged with a crime ([12]).

Moreover, any deviation by authorities from standard practices in handling prisoners, such as transfer to a distant place of detention or detention under unusual constraints, is subject to attack by writ of *quo warranto* or *habeas corpus*, and such writs may result in a judicial order freeing the detainee or manda-

ting an end to special measures taken against him (13). Failure of authorities to abide by such orders may result in prosecution for criminal contempt of court.

Under exceptional circumstances, however, the writ of *habeas corpus* may be suspended (14).

b) Civil law principles

in Continental Europe and many states elsewhere with a Continental legal heritage approach the question of detention is trealed from a different perspective, but with a substantially equivalent result.

i) *Grounds for arrest*

In civil law jurisdictions, arrests may be made only pursuant to a reliable complaint certified by a judicial officer, except when the person to be arrested is caught in *flagrante delicto* (15).

ii) *Arrest procedure*

Although law enforcement officers are ordinarily under an obligation to disclose their identity when making an arrest (16), the consequences of their failure to do so do not include, in most jurisdictions, the right of an individual about to be arrested to resist (17).

iii) *Use of force and coercion*

The degree of force used in effecting an arrest is justified only insofar as it is necessary to obtain or maintain custody of the person (18) and use of excess force may subject a law enforcement officer to discipline under administrative procedures (19) or to criminal prosecution (20).

iv) *Comunication by detainee*

The right of individuals detained to communicate with counsel or family varies widely from jurisdiction to jurisdiction. In most jurisdictions prompt communication with counsel is guaranteed (21), but in others, this right is subject to conditions that somewhat dilute it. (22).

Communication with family members on a reasonable basis is expressly provided for in most juridictions, but the matter of reasonableness is subject to existing circumstances (23).

v) *Conditions for continued detention*

Ordinarily, failure of law enforcement authorities to comply with the laws governing detention and arrest will render such detention or arrest invalid and release of the detainee may be effected by means of the writ of *amparo* in Latin American jurisdictions (24) or by direct intervention of a magistrate elsewhere (25).

In many Latin American jurisdictions and some other jurisdic-

tions, however, availablity of judicial relief may be delayed or excluded under various states of emergency (26). Other civil law giurisdictions have no provision for any state of emergency whatsoever (27).

However, laws providing for punishment of authorities for maltreatment of offenders generally remain in force even during states of emergency.

c) Socialist Law Principles

The protection afforded detainees under socialist law is very similar to that of civil law systems. One major difference, however, is that intervention by judicial authorities in matters relating to ongoing detention is severely limited (28). As a result, the remedy for any violation of these protections must be by independent judicial or administrative action, which would have as its chief consequence discipline of the violating authority, and amelioration of conditions for the detainee is only secondary (29).

2. - *Non-judicial Remedies*

a) Ombudsmen

In some States a separate authority exists for receiving complaints regarding conduct of state officials (30). Generally called an ombudsman, such an authority may be viewed as both judicial and executive in character because such an office both adjudicates complaints and exercises certain direct powers to effect remedies (31). Such an authority is capable of direct response to complaints of torture, by taking action to end immediately such practices.

b) Administrative Processes

Virtually all states provide for handling of complaints by detainees or their representatives through administrative channels. Such complaints are, therefore, effectively complaints addressed to the superiors of the persons whose conduct is objected to. The difficulty with such procedures lies in the accessibility of those superiors, so that complaints will not have to be channeled through the very subordinates whose conduct is complained of, with the attendant risk that the complaint will not be forwarded (32).

c) Legislated safeguards

Various states have in effect legislation designed to prevent maltreatment of detainees or to detect it quickly should it occur, by providing for frequent access to detainees by outside persons of his or her choice, including counsel, family and doctorts (33). The terms of these measures vary as to frequency and conditions of visits and as to degree of specificity.

d) Protection in time of armed conflict

The provisions of the Geneva Conventions are applicable to non-international as well as international armed conflicts and proscribe torture of any person detained in connection with such a conflict. The chief mode of implementation for this proscription is regular inspections by a Protecting Party designated by one of the Parties to the conflict (34). Such inspections give rise to reports to high officials of the detaining authority and, when applicable, to the detainees' representatives.

As a result, such intervention may function like an administrative complaint process in delivering complaints to superior authorities, or it may give rise to concern regarding possible reciprocal measures by the opposing party toward persons it detains (35). Also, such inspections may affect the flow of assistance from the International Committee of the Red Cross to the Detaining Party.

e) Non-governmental remedies

i) *The public-at-large*

Public reaction to complaints of torture may give rise to a general pressure on authorities in political positions to take measures to end torture. Such public pressure may be perceived as a threat to re-election of certain officials, a threat of a general strike or outbreak of violence.

It may function like an administrative remedy by calling complaints of torture to the attention of the superiors of those responsible for it, or it may assume the mandatory character of judicial intervention in that it may embody the threat of coercive measures if no action to end torture is taken.

ii) *Watchdog groups*

Many specialized non-governmental agencies exist whose interest in justice or humanitarianism impels them to monitor behavior of government officials with a view to detecting and calling attention to any abuses of power (36).

Such groups may accomplish an arousal of public reaction, or may accomplish the same effect as an administrative complaint procedure, and because of their expertise and in proportion to their reputation for responsibility, may exercise considerable leverage. They may also formulate proposals for legislation to remedy continuing abuses or provide specific information upon which decisive administrative action can quickly be taken.

3. - *Effectiveness of National Modes of Implementation*

Prevention and punishment of torture on the national plane has generally been found to be as effective as those persons occupying higher echelons of government choose to make it. Within

this broad observation, however, it is appropriate to focus first on two modes of implementation within national systems which appear to both evidence the interest of government in such prevention and punishment and to provide added efficiency in doing so.

a) Judicial Involvement

Allocation to judicial officers of a role in the supervision of custody of detained persons is a common practice and has been advocated by some writers as a panacea for human rights violations by the executive (37).

Under such a system continued detention and conditions of detention are subject to challenge in court, so that a full hearing and judicial determination of the propriety of detention is available (38).

To the extent that judicial authorities are independent of executive power, such systems greatly enhance the protection of human rights because a second hierarchy of authorities with a different perspective on national life is brought into the picture, and occurences of such practices as torture is thus subject to review by not only executive, but also judicial authorities. As a rule. torture would be likely to continue only if both hierarchies were lacking in concern for its prevention.

However, where the judiciary is not truly independent of the executive or shares the perspective of the executive too closely, such a system is readily reduced to a sham, with evidence suppressed by judicial control for the proceedings and continued detention being routinely ordered (39).

b) Safeguards

Such meausure as the requirement of probable cause for arrest of persons, permitting contact by detainees with family and counsel, and the like and to diminish the opportunities for executive authorities to indulge in torture because it would be generally necessary for them to violate one or more of these safeguards incidentally, and violation of such safeguards is more easily detected then acts of torture themselves.

In times of national emergency, however, such measures are frequently revocable by executive decree, and in some nations such states of emergency have become « normal » (40). Since it is precisely in such states of emergency that governments are most strongly motivated to indulge in torture, the ability of the executive to revoke safeguards renders them of little utility.

c) Administrative Action

A third mode of control is present in all nations, that of administrative intervention. Such a mode, however, has three fatal weaknesses:

1) The chain-of-command must ordinarily be followed in filing complaints, so that the authority complained of is often in a position to withhold the complaint from his superiors.

2) Administrative reaction to such complaints will depend on the attitude of authorities toward the practice of torture. If those at the top of the administrative hierarchy endorse the practice, no action to relieve the victim will be forthcoming. More tragic, if they are indifferent or merely naively refuse to believe their subordinates capable of such action, the result will be the same.

3) Filing of such a complaint may result in punishment of the person complaining at the instance of one of the officials handling the complaint. Thus complaining may be *worse* than useless.

d) Ombudsmen

The use of the ombudsman to protect detainees from torture depends for its effectiveness on the constitution of that office. If the ombudsman lacks independent enforcement powers, his existence merely serves to take administrative complaints directly to the highest authorities, and will be effective only if such authorities are concerned about prevention of torture.

If, on the other hand, the ombudsman is responsible only to the legislature or has independent enforcement power, he may provide the equivalent of judicial intervention.

e) Watchdog groups

Watchdog groups, may provide an effective means for communicating complaints of torture directly to the highest authorities, thus functioning in much the same way as an executive ombudsman. Also, they may provide a public airing of a complaint, and if the public is thus incited to concern, pressure may be felt by the executive to act on the complaint. But such publicity may be obtained only where press freedom permits publication of such material, which is unfavorable to the government, and under states of emergency press freedom is generally curtailed ([41]). Thus it may be impossible to marshal public opinion in precisely the circumstances where torture is most likely to occur.

B. - International

1. - *The United Nations*

a) Framework of Implementation

The general language regarding human rights in the United Nations Charter has formed the basis for two general kinds of

implementing action. The more dramatic of these, involving condemnation and sanctions, has not been framed in terms of enforcement of human rights, and the other method of implementation carries no threat of sanctions.

The first form of action is exemplified by the condemnation of and application of sanctions against Southern Rhodesia by the General Assembly and Security Council (42). Although the violation of human rights in that state was at the heart of this action, the action was framed in terms of the threat to world peace posed by efforts of a small white minority to hold in a position of inferiority a vastly larger number of black citizens on a continent where surrounding governments are run by black majority rule (43). The limited applicability of such a rationale is attested to by the failure to take similar action against other countries, despite reports of consistent and widespread violations of human rights in those states. Accordingly, such a mode of implementation would appear to be inapplicable to torture.

The second mode of implementation used by the United Nations is that of calling for reports from members on their implementation of U. N. policies (44), among them, U. N. policy regarding human rights as reflected in the Charter and the Universal Declaration (45). The International Covenant on Civil and Political Rights creates such a reporting system as well (46).

These Reporting systems provide only for receipt of such reports and commenting upon them or publicizing them. Thus, the information involved is information already known to member states' officials ,and it is only the assessment of the U. N. agency involved that is added to this information.

For many years there has been a procedure by which communications containing allegations of violations of human rights from any source could be referred to the Commission on Human Rights.

In 1970, under ECOSOC Resolution 1503 (XLVIII), a new procedure was devised under which the Commission on Human Rights could authorize that communications relating to situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights be the subject of a thorough study or investigation. Many cases have been referred to the Commission under this procedure but no study or investigation has as yet been ordered.

Under the Optional Protocol to the International Covenant on Civil and Political Rights, however, a mechanism for processing complaints by individuals is created (47), so that responses may at times inform member states of matters not previously known to them, thus serving as a potential aid to administrative remedying of the situation. Unlike the Resolution 1503 procedure,

this procedure is concerned only with complaints by or on behalf of individual victims. The cases are considered by the new Human Rights Committee.

All of these reporting schemes have as their only coercive element the possibility of generating information and opinions unfavorable to a particular government and giving them wide publicity.

b) Assessment

To the extent that torture is seen as a violation of the general provisions of the U. N. Charter, the General Assembly may vote to impose such general censure as it desires ([48]). To the extent that it is viewed as a threat to peace, the Security Council may impose appropriate sanctions ([49]).

Such sanctions, however, would have to be directed at states, rather than individual members of government ([50]). As a result, any sanctions strong enough to effectively coerce members of government to abolish a policy of torture would be very grave and would therefore be unlikely to be imposed in view of the political nature of these bodies.

The International Covenant on Civil and Political Rights provides, under its Optional Protocol, for reference of complaints to the U. N. Human Rights Committee for consideration ([51]). Deliberation of this body are, however, confidential, so that embarrassment of the state complained of is minimal at this stage. And the most drastic action possible is reporting to the General Assembly that a violation of the Convention has occurred. The procedure under Resolution 1503 has been found so unpromising that it has never yet resulted in any investigation.

2. *The European Commission and Court of Human Rights*

a) Framework of Implementation

The European Convention on Human Rights provides for creation of a commission and court to implement its guarantees ([52]). Complaints may be filed by other signatory states or by individuals ([53]), but in the case of individuals, domestic legal remedies must have been exhausted unless the harm complained of arose as a consequence of a consistent administrative policy or other established procedure ([54]).

Complaints are sent first to the Commission ([55]), which attempts to arbitrate an amicable settlement. The commission may, if no such settlement is forthcoming, determine whether there has been a breach of the Convention, and report its findings to the Committee of Ministers of the Council of Europe together with any recommendations it may have ([56]). Complaints may be filed with the Court by the Commission or by affected contracting parties ([57]).

The fundamental difference between this system and the U. N. reporting scheme lies in its provision for through litigation of contested claims and for a definitive pronouncement on the merits of the case. Thus, the publicity aspect of any condemnation arising out of a complaint is tightly focused and apparently based on clear and complete evidence carefully considered.

Moreover, the relationship of the Convention to the Council of Europe provides for the possibility of enforcement by expulsion of a culpable state from the Council ([58]).

b) Assessment

The European Convention provides for action on complaints at three levels. First, adjudication by the Commission and the Court on the merits of the complaint is provided for ([59]). Secondly, a determination that there has been a violation gives rise to a duty by the state concerned to comply with the Convention, and finally if compliance is not forthcoming, the matter may be referred to the Council of Europe's Committee of Ministers for action. Only once so far, in the Greek case ([60]), has the possibility of resort to this last forum been provoked, and the result was that the accused party withdrew from the Council of Europe before the Court had even passed on the merits of the complaint. Two inferences may be drawn from this: First, that the process of implementation under the European Convention sufficiently focuses embarrassment on the accused party to compel it to take rather drastic action to avoid being declared guilty of violations; and secondly, that rather than permit the kind of pressure on its domestic policies that this process can produce, a state may choose to forego the benefits it derives from membership in an international organization.

Thus, it appears that, when the condemnation is sufficiently potent to be effective, a state may disown the entire process by which it was formulated and renounce the convention in question.

3. - *The Inter-American Commission on Human Rights*

a) Modes of Implementation

The Inter American Commission on Human Rights, which derives its present authority from the Organization of American States, utilizes a reporting scheme similar to that of the U. N. organs ([61]). However, the Commission's competence is extremely wide in comparison to that of the U. N. Commission on Human Rights ([62]), and by holding its deliberations within states about which concern has been expressed, it has been able to make its presence felt in a dramatic way that has, perhaps convinced potential complainants of the usefulness of filing compliants and culpable governments of the unpleasant consequences of conti-

nued violations of human rights (63). Reports of findings are published.

The ultimate sanction under this system is the reporting to the Organization of American States a finding of a violation which a signatory state refuses to remedy (64). Thus the general publicity potential of Commission reports is augmented by the coercive potential of OAS actions (65). It should be noted that the American Convention of Human Rights would, if implemented, create a court similar to the European Convention's Court (66).

b) Assessment

The Commission, in addition to adjudicating disputes, may refer matters to the Organization of American States (OAS) in much the same fashion as under the European system. Accordingly, it may be supposed that this mode of implementation is of comparable effectiveness (67).

4. - *Armed Conflicts*

The provisions of the Geneva Conventions apply in the same manner as discussed above regarding allarmed conflicts, but with two added features. First, the opposing party in an international conflict is more likely, as a state, to be in a position to pose a serious threat in the form of reprisal, in the event of any mistreatment of its nationals, and secondly, in such conflicts the need for assistance from the International Red Cross is likely to be greater so that the threat of suspension of such aid is likely to occasion greater concern.

The implementation scheme of the Geneva Conventions relies on the use of Protecting Parties to monitor compliance with convention provisions (68). The results of such inspections are made known to the parties to the conflict so that the detaining authority will be aware of any violations and therefore able to act to remedy them, and the party whose persons are detined will be aware of the circumstances of their detention. But if the detaining party were to engage in torture as matter of policy, the only effective countermeasure would be for the other party to the conflict to retaliate against detainees in its possession, and such action would be inconsistent with the humanitarian purposes of the Convention, and probably a violation of the customary laws of war as embodied in the Hague Conventions.

5. - *Watchdog Groups*

On an international plane there are also specialized agencies independent of governments capable of effecting essentially the same results as their counterparts at the domestic level, particularly in exposing violations of treaty obligations (69).

Such activities have two effects: They function like reports

of ombudsmen, and they bring international public attention to focus on possible problems. In the former case, effectiveness of such action depends on the good will of high authorities in the state wherein the alleged torture was reported. In the latter, such authorities are subjected to public opinion pressure from persons outside their state, and while such opinion may not affect the future stability of government in the way domestic public opinion can, it may motivate such authorities to take remedial action to avoid further embarrassment, to regain respect for their state before world opinion or to avoid the consequences to them of their state of action based on such reports by other state or international organizations.

6. - *Other states*

In recent years, increased global concern regarding violations of human rights have resulted in a number of state to state measures on behalf of human rights. In the context of the European Convention, four states filed complaints against Greece with the Commission ([70]), demonstrating a growing convinction that human rights are a matter of international concern. Also, the United States has enacted legislation conditioning its foreign aid on respect by recipient governments for human rights ([71]). Other states have granted foreign aid on a state-by-state basis, and have used as one of their factors in determining whether to grant aid to a given state its policy on human rights.

The most striking example of action by states in response to human rights violations has been « humanitarian intervention » such as the Indian action in Bangladesh. The validity under international law of such action is open to question ([72]), as is the degree of « humanitarianism » such armed confrontation is likely to accomplish ([73]). Moreover, even those who do support the validity of a principle of humanitarian intervention would restrict application to situations of gross and repeated violations of human rights ([74]).

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(1) U. N. Doc. A/10158/Add. 1 page 5, para. 7, for the UK position (hereafter A/10158) and Amendment IV U. S. Constitution.

(2) In the UK, Section 2 of the Criminal Law Act of 1967 also permits warrantless arrests if the officer reasonably suspects an individual is about to commit an offense or has done so. *See generally* S. de Smith, *Constitutional and Administrative Law* 355-506 (1971) (hereafter de Smith). For U. S. Cases in point see L. Hall, Y. Kamisar, W. Lafave, J. Israel, *Modern Criminal Procedure* p. 199 et seq. (1969 and supp. 1976).

(3) *See, Elk v. United States*, 177 U. S. 529 (1900). *See also, People v. Briggs*, 19 N. Y. 22, 37, 224 N. F. 22, 93 (1966), and M. C. Bassiouni, *Substantive Criminal Law* (1978) and M. C. Bassiouni, *Citizen's Arrest* (1977). *Briggs*, 19 N. Y. 22, 37, 224 N. F. 22, 93 (1966).

(4) *Id.*

(5) *See*, A/10158/Add. 1 *supra* note 1, at 6, para. 10 for the Canadian and UK provisions.

(6) *Id.*

(7) *Id.* at pp. 25-26, para. 85 & 86, for the UK position.

(8) *Id.* at p. 25, para. 82 for Canada, and at p. 12, para. 38 for UK and New Zealand. For the United States, U. S. Const. amend. VI. and *e. g.*, *Miranda v. Arizona*, 384 U. S. 486 (1966).

(9) *Escobedo v. Illinois*, 378 U. S. 478 (1964). *See*, *Mapp v. Ohio* 367 U. S. 643 (1961), *see also Terry v. Ohio*, 392 U. S. 1 (1968).

(10) A/10158, *supra* note 1, at p. 10, para. 26 for Canada.

(11) Medical visits in the UK are discussed in *Id.* at p. 13, para. 41.

(12) In the UK, Section 38 (4) of the Magistrates' Courts act, 1952, *Id.* at p. 6, para. 11.

(13) For UK and Canadian Law *see Id.* at p. 24, para. 80.

(14) U. S. Const., art. 1, 89, *see also* A/10158, *supra* note 1, at p. 8, para. 18.

(15) *See*, Art. 56 of the State Constitution of Peru in UN Doc. E/CN/.4/ Sub 2/374/Add. 3, p. 9.

(16) *See, e. g., State v. Phinney*, 42 Me 384 (1858) and *State v. Taylor*, 70 Vt. 1, 39 A. 447 (1896).

(17) *See, e. g. Presley v. State*, 75 Fla. 434, 78 So. 532 (1918).

(18) Austrian law on this point is described in UN Doc. A/10158/Add. 1, *supra* note 1, at p. 14, para. 45.

(19) *Id.* (for Austria) at p. 25, para. 85.

(20) Relevant provisions of the Criminal Code of Argentina are reproduced in *Id.* p. 26, para. 89.

(21) Peru's provisions *Id.* at p. 11, para. 32.

(22) *E. G.* Peru's provisions are relaxed in a state of emergency.

(23) For Argentian law, *see Id.* p. 23, para. 78.

(24) For Peru, *Id.* p. 24, para. 80.

(25) In Czechoslovakia, it is the prosecutor who has such power. *Id.* at p. 24, para. 81.

(26) *See*, note 22, *supra.*

(27) Austria, for instance has no such provisions. Comments of Mr. Erik Nettle, member of the UN Human Rights sub-commission before that commission, Aug. 24, 1977.

(28) Statute on Supervision by the Procurator's Office of the USSR, Article 34 makes it the responsibility of this office. UN Doc. A/10158/Add. 1, *supra* note 1, at p. 24, para. 81.

(29) *E. g.*, Byelorussian Crim. Cod. *Id.* at p. 26, para. 87.

(30) *See, e. g.*, Frank, «The Ombudsman and Human Rights - Revisited », 6 *Israel Y. B. on Human Rights* 122 (1976).

(31) Five Canadian provinces have such official, reporting to the legislature. *Id.* at p. 27, para. 94.

(32) *See. e. g.*, deSmith, *supra* note 2, at 386-87.

(33) *See*, note 11, *supra.*

(34) Protocol I, Art. 5.

(35) Geneva Convention III, arts. 8-11.

(36) *E. g.*, the American Civil Liberties Union in the United States. A sampling of non-governmental agencies active in this area on national and international planes may be found in Chapter I, note 46.

(37) *See, e. g.* L. Kutner, *World Habeas Corpus* (1962) and L. Kutner, *The Human Rights to Individual Freedom* (1970).

(38) *Id.* For the Islamic view, *see* Bassiouni, « Islam: Concept, Law and Habeas Corpus », 1 *Rutgers* (*Camden*) *L. J.* 160, 181-95 .1969). The concept of *habeas corpus* is well-known in Latin America. *See, e. g.*, Murray, A Comparative Study of Peruvian Criminal Proceedure, 21 *U. Miami L. Rev.* 607 (1967) and Constitucion Politica de Peru, Art. 69 (1963). In Mexico, the equivalent concept is represented by the writ of *amparo. See, e. g.*, G.

Colin Sanchez, *Derecho Mexican de Procedimientos Penales* (1st ed. 1964); Constitucion Politica de los Estados Unidos Mexicanos, Art. 33; and Cogido de Procedimientos Penales (1940).

(39) A variation on this is the Philippines system, wherein the courts are specifically excluded from deciding « the validity, legality or constitutionality of any decree, order or acts issues, promulgated or performed by the President ». Amnesty International, *Report on Torture* 158 (1975).

(40) Constant states of seige have been noted in many such states. For a comment on Peru, *see, e. g.*, Amnesty International, *Report on Torture* (1975).

(41) *E. g.* the recent closing by South Africa of a black newspaper that had focused attention on the suspecious death of a black activist in police custody.

(42) S3Res. 217 (1965), 20 Nov. 1965. G. A. Res. 2382 (XXIII), 7 Nov. 1968.

(43) Van Dyke, *supra* note 14 of Ch. VI, at 209-12 and 160-62.

(44) Article 64 of the Charter is the basis for authority to require such reports.

(45) Of particular importance in connection with torture in Res. 7 (XXVII) of 20 Aug. 1974 of the Sub-commission on Prevention of Discrimination and Protection of Minorities.

(46) The reports are handled in accordance with ECOSOC Res. 1503 (XVIII), which created the Human Rights Committee to study such reports.

(47) Art. 2 of the Optional Protocol, which is limited, however by Art. 3, 4 and 5. *See*, Tardu, « The Protocol of the United Nations Civil and Political Rights and the Inter-American System: A Study of Co-existing Petion Procedures », 70 *Amer. J. Int'l* 778 (1976) (hereafter Tardu).

(48) U. S. Charter, art. 14.

(49) U. N. Charter, Chapters VI-VII.

(50) *See generally*, U. N. Charter.

(51) *See, supra* note 47 and accompanying text.

(52) Art. 19-56.

(53) Art. 25.

(54) Art. 26.

(55) Arts. 24 and 47.

(56) Art. 31.

(57) Art. 48.

(58) Art. 54 provides, « The judgment of the Court shall be transmitted to the Committee of Ministers [of the Council of Europe], which shall supervise its execution ».

(59) European Convention, art. 24 *et. seq.*

(60) *See*, Section VI, *supra* notes 68-72 and accompanying text.

(61) Art. 41 of the American Convention of Human Rights.

(62) Under the American Convention Art. 41 would provide broad competence.

(63) Van Dyke, *supra* 14 of Ch. VI, at 175-77.

(64) Arts. 50 and 51.

(65) Art. 73.

(66) Arts. 52-69.

(67) Tardu, *supra* note 47.

(68) Convention I, art. 8; Convention II, art. 8; Convention III, art. 8; Convention IV, art. 9.

(69) E. g., Amnesty International, The International Commission of Jurists, and the International Committee of the Red Cross. *See* comment, Human Rights, Chile and International Organizations, 24 *De Paul L. Rev.* 999 (1975), and *supra* note 40.

(70) *See* note 60 of Ch. VI, *supra.*

(71) E. g., the so-called « Jackson Amendment », 22 U.S.C.A. 2304 (1976).

(72) For supporting view, Lillich, « Forcible Self-Help by States to Protect Human Rights », 53 *Iowa L. Rev.* 325 (1967), and M. Bassiouni and

V. Nanda, *A Treatise on International Criminal Law*, 212 (1973); and H. Lauterpacht, *International Law and Human Rights* 32 (1950). For contrary views and lively discussion *see, Law and Civil War in the Modern World*, 44-46, 217-251, 539-41 (J. N. Moore ed. 1974). *See also*, Falk, *The International Law of Civil War* (1971), and International Commission of Jurists, *Study on East Pakistan* (1972).

(73) Comment, « Human Rights. Chile and International Organizations », 24 *De Paul L. Rev.* 908, 1017 (1975); Friedmann, Comment 4, in *Law and Civil War in the Modern World* 574, 577 (1974).

(74) Lillich, *supra* note 72; *see also*, Lillich, « Humanitarian Intervention: A. Reply », in *Law and Civil War, supra* note 72, at 229-51, especially 248.

SECTION VII

Prognosis: The need for an International Convention

The discussion contained in the preceeding sections reveals that abolition of the practice of torture is essential to the preservation of the values of: individual integrity, public order which includes the legitimacy, integrity and reliability of political systems, and minimum world order. It is useful at this juncture to reiterate the basic premises upon which is founded the conclusion that torture should be singled out as the object of a specialized convention aimed at its prevention and suppression.

1.) Torture is a recognized cruel, inhuman and degrading treatment;

2.) It is embodied in the meaning of these very words which are found in internationally protected human rights under conventional, customary and general principles of international law;

3.) It is prohibited explicitly or implicity by almost all legal systems of the world;

4.) The commonly shared values and expectations of the world community have focused on this practice demonstrating its ripeness for special consideration;

5.) Existing modes of implementation of general internationally protected human rights are limited in scope, application and acceptance;

6.) The practice is characteristically carried out by individuals in an environment of stealth and secrecy, making it difficult to discover, investigate, prevent, and suppress;

7.) It is generally rejected or denied even by states wherein it occurs;

8.) It produces at best, short term and limited advantages for its practioners, while engendering greater disadvantages for the legitimacy, integrity and credibility of the system which permits it or tolerates it;

9.) It weakens the moral authority and effectiveness of any system which permits it or tolerates it, and thus its long range implications to the preservation of that social order and political system are far more detrimental than the limited tactical benefits perceived to derive there from;

10.) Its dehumanizing effect is not only limited to the victim

but it also reaches its perpetrators and its effects pervasively erode the very fabric of the society which permits it or tolerates it;

11.) Its prevention and suppression by international law does not infringe upon states' national interests, soveregnity or effective government on the contrary, it strengthens it;

12.) Its repeated and continued occurrence jeopardizes and ultimately destroys international confidence in the practicing state;

13.) Its effects on the international relations of the practicing state with other states is negative and detrimental;

14.) Its significant occurrences as a matter of state policy whether overtly acknowledged or covertly condoned threatens minimum world order.

A. - Prospects for Elimination of Torture Under the Existing Legal Environment

1. - *Assessing the Phenomenon*

In the first section of this report it was demonstrated that the practice of torture has roots that reach far back into human history and that it has manifested itself in diverse times and places. Its contemporary manifestations appear in several forms and within different regions of the world having varying political, cultural and developmental backgrounds. Succeeding sections explored the fundamental sameness of torture irrespective of changes in means and methods; the difficulty in classifying certain borderline coercive practices and the conflict between the practice of torture and certain basic human and social values. It was demonstrated that a social policy framework of analysis must be utilized to reconcile the contrasting values of individual integrity and the values appealed to by those who would hesitate to condemn torture or rationalize its practical importance. This analysis focused on the identification of classes of perpetrators, victims, methods, goals, strategies and outcomes that torture features. The conclusion is that the pattern of torture's history, its ability to establish itself under varying conditions assuming different outward manifestations while purporting to serve certain practical purposes, demonstrates that such a phenomenon cannot be ignored nor treated lightly. Consequently, its eradication from human practice cannot be presumed to occur without the development and implementation of effective measures of control designed to prevent and suppress its occurrence.

2. - *Assessing the Legal Environment*

In Section VI, the existing primary sources of international

legal prescriptions regarding torture were examined. All but one of these sources were found to be too vague to be an effective legal basis for the unequivocal condemnation of torture. That source was « general principles » as evidenced by United Nations General Assembly Resolutions such as Res. 3059 (XXVIII) 2 Nov. 1973; Res. 3218 (XXIX) 6 Nov. 1974; Res. 3452 (XXX), 9 Dec. 1975; 3453 (XXX), 16 Jan. 1976 and other Resolutions of ECOSOC, the Commission on Human Rights and the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. Nevertheless these resolutions are only declaratory and not binding *qua* as a norm of international law. All international legal prescriptions in the form of treaties which include torture, do so without providing any definition of the meaning of that term. None specifically defines torture, or describes the duty of states to prevent it or suppress it.

Existing international prescriptions leave some opportunity for states that practice torture to argue that the conduct in question does not actually violate international law or that it may be deemed justifiable. In any event, international modes of implementation afford no means for settling such issues, much less enforcing compliance.

At the national level, a bewildering variety of prescriptions either clearly or probably proscribing torture exist together with an array of qualifying formulae. However, no national law appears to specifically authorize or condone torture, even though by implication one can say that in many legal systems, it could legally exist. Thus, no state openly authorizes torture and most appear to forbid it; and, International prescriptions prohibit it, but either in vague or inferential terms which are applicable to states without enforcement or sanctions and whose proscriptive binding effect is open to question.

In Section VII, it was shown that implementation of international prescriptions takes many forms, only one of which appears effective: the court and commission created by the European Convention on Human Rights. Even then, it is limited in application to cases involving signatory states to that convention.

National measures of implementation appear ineffective except where either the high officials of government are zealously committed to preventing, suppressing and punishing torture or where an independent authority usually the judiciary is motivated to prevent, punish and suppress torture. But the abridgment of judicial autonomy and the resort to exceptional powers in states practicing torture reveals how aleatory this safeguard can become.

Accordingly, the existing legal environment is inadequate to the task of eradicating the practice of torture and offers only mild promise for significantly curtailing it.

B. - New Approach for the Elimination of Torture

It is clear that something must be added to the legal environment to make it effective against torture. One approach would be to increment existing human rights proscriptions and gradually strenghten their implementation. A second possibility is to attempt an altogether different formula.

1. - *Augmenting Existing Formulae: Following the Human Rights Protective Model.*

International protection of human rights has historically developed in a gradual evolutionary process. At first, rights are enunciated, then they are clarified and specified and thereafter some measures of implementation are devised. Ultimately enforcement may be attained [1]).

The first enunciation of contemporary internationally recognized human rights is embodied in the Universal Declaration of Human Rights of 1948. However, its binding effect is still unsettled ([2]) and the absence of any enforcement mechanism makes it of little effect to prevent and suppress torture. The Declaration was then reinforced by the International Covenant on Civil and Political Rights which prohibits torture but does not define that term, and whose Optional Protocol is insufficient to provide an effective enforcement mechanism against a violating party. Thus, the Covenant could be amended or interpreted by the International Court of Justice to make explicit the prohibition of torture, but that would not solve the problem of its implementation.

To provide an effective mode of implementation would require a new optional protocol, providing more effective measures of control than those under the existing Optional Protocol. The enforcement scheme of the Optional Protocol is limited in scope and effect. It provides no significant enforcement mechanism likely to prevent, let alone suppress the practice of torture; if for no other reason than the fact that there are no sanctions against individual violators nor specific duties on states to prevent and suppress the practice. Probably no more could have been done with the Optional Protocol because its application extends to all the protections embodied in the Covenant. This explains the relatively limited measures of implementation provided for in the Protocol and even so why it has not been widely ratified. The wide acceptance of the Covenant with no implementation procedures contrasts with the very limited acceptance of the Protocol which has some implementation procedures thus clearly indicating that another Protocol with more effective measures would attract few adherents.

Consequently, while it would be theoretically feasible to re-

medy the weaknesses of the Covenant and of the Protocol, it is unlikely that this approach would enlist support.

Another promising model is that of the European Convention on Human Rights and its implementing mechanism. Although its prohibition of torture is not given a definition in that document, this weakness is overcome by elaboration of the meaning of that provision by the European Court of Human Rights in two cases questioning what acts were prohibited by the Convention (3). Thus, implementation measures under the Convention are effective, but the Convention and its implementing organs are limited in geographical scope.

A ready alternative would be to promote similar regional models girdling the globe. However, a first step toward this approach has already been attempted and met with apparent failure. The Americas, another region of the world with a history of multilateral cooperation has its own regional human rights convention open to all members of the Organization of American States. Yet so far this Convention has attracted only three ratifications, creating doubt that it will ever take effect.

Accordingly, the regionalism formula appears unpromising for application in regions of the world, where shared values and similarities of legal and political systems is not sufficiently similar to engender the cooperative approach found between the Western European countries.

The resistance of states to conventions protecting human rights with effective modes of implementation requires evaluation. The universality with which declarations and treaties lacking strong measures of implementation are accepted suggests that there is little disagreement concerning the ends of preventing, suppressing and punishing torture. The difficulty lies in that torture is included as part of many other protected human rights which are not equal in recognition. There is for example, no distinction between the right to « social security » and the right to be free from « Cruel, inhuman or degrading treatment » which includes torture. And it is probably the lumping together of rights of differing dignity that weakens the enforcement of those rights of higher dignity. Thus the need to distinguish among human rights and to establish priorities for selective specialized treatment leading to effective implementation appears indispensable. In conclusion, it appears that one cannot rely on the incremental approach of existing international human rights prescription to effectively prevent and suppress torture because the nature of the scheme of protection now existing encompasses a wide variety of rights whose enforcement or equal enforcement is not generally recognized. To endeavor to reinforce the existing scheme would only lead to a standstill on the issue of prevention and suppression of torture.

2. - *A Proposed formula: Protecting Human Rights Through International Criminal Law*

Strenghtening human rights involves a variety of processes operating at various levels and whose combined effect is to produce that very outcome. Clearly the identification of certain basic values and their singling out for special consideration is one of the methods by which the coalescence of shared expectations can be translated into specifically enunciated rights deserving greater recognition and protection. Consequently it cannot be expected that the reinforcement of general human rights prescriptions which include, but do not single out torture, will produce the desired outcome of strenghtening its prohibited character. Furthermore, the advancement of all aspects of human rights cannot be presumed to ripen uniformly. The conclusion is therefore inescapable, that torture must be lifted out of the total context of other human rights protections and presented singly as the needed object of particularized protection. To that end a special convention defining the prohibition with implementing procedures is indispensable.

The elaboration of such a convention could take various forms. One approach is the now traditional enunciative convention which defines the interest sought to be protected. But to do so without more would at best, give the prescription a specific definitional context. To be sure it would be a progressive step because of its coalescing significance and its embodiment of shared values and expectations which would reinforce opposition to the practice. That approach by its very nature, judging by the precedents of other internationally enunciated human rights is limited in scope, application and impact and remains without implementation. It must also be noted that the practice of torture is essentially carried out by individuals, seldom endorsed by official policy and never acknowledged publicly. Thus, to define the prohibited practice without developing specific provisions for its implementation involving preventive and suppressive measures would accomplish little for its control and ultimate eradication. This is not to discount the significance of what such an approach could accomplish in terms of sensitizing world public opinion and heightening resistance and opposition to its existance. In fact, such a process is indispensable to the commulative effect of other means which should operate separately and complementarily to set in motion a series of processes whose overall impact would produce the desired prohibitory effect.

The proposed approach is to specifically aim the international prohibition against the individual who engages in such a conduct, and to have the implementation of the legal proscription based on the model of indirect international enforcement with some direct internationally enforceable measures.

The examples of such an approach are the various international conventions which criminalize certain internationally prohibited behavior (4). Among these are: The 1948 Genocide Convention; The 1961 Single Convention on Narcotic Drugs, The 1972 Amending Protocol thereto, the 1971 Convention on Psychotropic Substances; the Four Geneva Conventions of August 12, 1949 and the 1973 Draft Addition of Protocol thereto; the 1963 Tokyo, 1970 Hague, and 1971 Montreal Conventions on Aircraft Hijakking; the 1973 Convention on Kidnapping of Diplomatic Personel.

Under that model the Convention of the Prevention and Suppression of Torture would define the prohibited conduct, establish individual criminal responsibility for its practice; require signatory states to take certain measures for its prevention and suppression; establish a duty of international cooperation for its prevention and suppression by recognizing the principle *aut dedere aut judicare* which requires states to prosecute or extradite; recognize universal jurisdiction; lay the foundation for an eventual international criminal jurisdiction; define the duties of cooperation among judicial authorities seeking prosecution, punishment and extradition of offenders for prosecution and punishment.

The elements of the desirable approach are: 1) an effective national control system; 2) supported by an international duty to carry them out, and; 3) bolstered by some direct enforcement measures such as a right of petition, a reporting system and dissemination of information. Some of these measures are already recognized in international human rigts protections, (5) others exist in the international criminal law system. None of these measures is new and all of them have gained wide acceptance and adherence. Suffice it to recall that the Geneva Conventions are adhered to by over 140 states and the International Narcotics Control System by over 103 states.

As stated elsewhere: « The new strategy proposed by this writer is therefore to convert the shield (protection of human rights) into a sword (international criminal responsibility), transforming world community aspirations into proscriptions. International criminal law should become the means and method by which to enforce human rights guarantees » (7).

In a Report to the Fifth United Nations Congress on Crime Prevention and Criminal Justice of September 1975, this writer also stated:

« International [Criminal Law would] then represent one of the strategies employed to achieve. In respect to certain world social interests, this greater degree of compliance and conformity with the goals of prevention, preservation, and rehabilitation. These world social interest have emerged from common experience in the course of time and reflect certain shared values which the world community has come to recognize as requiring collec-

tive coercive or cooperative efforts to insure their protection. Thus, the object of the normative prescription of international criminal law is specific conduct identified as harmful to a given world social interest whose protection is deemed to require the imposition of criminal sanctions on the authors of such harm and which sanctions are enforced by the member states of the world community through collective, cooperative or national action» ([8]).

The proposed Convention for the Prevention and Suppression of the Practice of Torture which is suggested and whose text follows addresses the *lacunae* noted above in the following ways:

1) it provides a clear and acceptable definition of torture which has not existed so far;

2) it applies to all contexts in which torture occurs and extends universally to all states;

3) it focuses on the one form of torture least likely to be effectively handled by domestic measures without some form of international duty and control: torture inflicted by or on behalf of public officials;

4) it holds individuals responsible for violations, thereby avoiding the practical deadlock resulting from use solely of state responsibility;

5) it creates a credible threat of punishment of individuals by declaring torture, as defined, by public officials to be an international crime;

6) it provides a duty on all signatories to extradite persons so accused for their prosecution and punishment;

7) its mechanism operates to focus maximum international condemnation upon a state for refusing to prosecute or extradite a torturer;

8) it sets out specific preventive measures for states to carry out;

9) it provides some modicum of international implementation, within recognized and already applicable means;

10) it reinforces and strenghtens the resolve and ability of individuals and states opposing the practice without placing unreasonable duties or creating undue embarassment for states willing to comply therewith.

Conclusion

Torture is an inhuman, cruel, degrading and debasing practice whose eradication is compelled by contemporary values and aspirations of the world community. The attainment of this goal can only be achieved by a combination of factors which include: national opposition to the practice, strenghtening of individual resolve to stand against it, and the development of effective

means to prevent and suppress its occurence. National and international implementation of such a goal will depend largely on individual and collective resolve to wilfully collaborate in its attainment. In time the commonly shared values and expectations of the world community will simply cause it to wither away, just as has been the case for slavery and slave trade even though occasional incidents may still occur. Nothing in the proposed approach and the conventional scheme proferred is beyond existing international modes of implementation. For all these reasons and for the arguments discussed in this study the adoption of the proposed Convention first by appropriate U. N. organs and thereafter by all civilized states is a likely and reasonable prospect which is hopefully anticipated. It must be noted however, that such a convention for the prevention and suppression of the practice of torture should also be supplemented by other measures which can hopefully be enforced. Among these are:

1) The Draft Code of Conduct for Law Enforcement Officials, submitted to the General Assembly for action in 1977;

2) The elaboration of a Code of Conduct for the Legal Profession;

3) The elaboration of a Code of Conduct for the Medical Profession, and Other Categories of Medical Personel.

4) A set of Principles for the Protection of Detainees.

The latter is presently being considered by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in the nature of: A Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.

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(1) *See* Nanda and Bassiouni, « Slavery and Slave Trade: Steps toward its Eradication », 12 *Santa Clara Lawyer* 424 (1972). *See also,* M. Moskowitz, *The Politics and Dynamics of Human Rights* (1968); and McDougal, Lasswell and Chen, « Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry », 63 *A. J. I. L.* 237 (1969), which states at 267: « Let it be said immediately that a certain minimum of values indispensable to a dignified human existence must be prescribed as immune from all claims of derogation at all times. Notably among these are the right to life, freedom from torture and inhuman treatment, freedom from involuntary human experimentations, freedom from slavery, the slave trade and servitude, freedom from imprisonment for debt, freedom from retroactive application of criminal punishment, the right to recognition as a human being, and freedom of thought, conscience and religion. These rights and freedoms are indispensable to a dignified human existence and must remain wholly intact from derogation upon grounds of crisis. In terms of our basic postulation, it can never be necessary to encroach upon these rights and freedoms, even in time of emergency. Nor would their deprivation ever be proportional. If the emerging concept of *jus cogens* is to be given rational meaning in the context of a world public order of human dignity, its bedrock must be in this minimal protection of human rights ».

(2) Advisory Opinion of the International Court of Justice of « The

Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (1970) », 1971 *I. C. J. Rep.* 16. Schwelb, « The International Court of Justice and the Human Rights Clauses of the Charter », 66 *A. J. I. L.* 337 (1972), and M. C. Bassiouni, *International Extradition and World Public Order* (1974) at 151 *et. seq.* on human rights and state responsibility.

(3) *Denmark, Norway, Sweden and the Netherlands v. Greece,* Application Nos. 3321/67, 3322/67, and 3344/67; and *Ireland v. U. K.* Application No. 5310/71, decided by the European Commission on Human Rights Oct. 1, 1972.

(4) M. C. Bassiouni and V. P. Nanda, *A Treatise on International Criminal Law* (1973) Vol. II; and Bassiouni, « An Appraisal of the Growth and Developing Trends in International Criminal Law », 45 *Rev. Internationale de Droit Pénal* 405 (1974). *See also,* S. Plawski, *Etude des Principes Fondamentaux du Droit International Pénal* (1972); C. Lombois, *Droit Pénal International* (1971) and D. Oehler, *Internationales Strafrecht* (1973).

(5) See the procedure for the processing of individual complaints under the Optional Protocol to the International Covenant on Civil and Political Rights, implemented by ECOSOC Res. 1503 (1970).

(6) Bassiouni, « The International Narcotics Control System », 46 *St. John's L. Rev.* 713 (1972); Bassiouni, « International Aspects of Drug Abuse: Problems and a Proposal », 9 *John Marshall J. Prac. & Proc.* 3 (1975).

(7) Bassiouni, « The 'Human Rights Program': The Veneer of Civilization Thickens », 21 *De Paul L. Rev.* 271 at 277-78 (1971).

(8) Bassiouni, *supra* note 4 at 4. *See also,* L. B. Sohn and M. E. Galey, Twenty-fifth Report of the Commission to Study the Organization of Peace, *New Aspects of the International Protection of Human Rights* (1977), especially at 24-25.